No. A-

SUPREME COURT OF THE UNITED STATES

HERBERT J. HOFFMAN,

Applicant,

v.

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

Respondents.

MEMORANDUM IN OPPOSITION TO 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

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QUESTION PRESENTED

In this case, the Maine Supreme Judicial Court, sitting as the Law Court (hereinafter "Law Court"), concluded that the plain meaning of Maine's election statute required that any petition sheet submitted by Applicant that failed to include a correct, true oath as to certain petition circulation requirements was void and could not be counted in determining whether enough signatures had been collected for Applicant to qualify to be placed on the ballot as a candidate for United States Senator. Applicant and the Department of Secretary of State (which had declined to exclude the defective petitions and instead excluded only the specific signatures thereon that were found to have rendered the oath violative of the law) argued in state court that the statute should be construed otherwise because it was ambiguous and any ambiguity should be resolved so as to avoid a question regarding the constitutionality of the petition requirements. Finding no ambiguity in the language at issue, the Law Court reversed the lower court and the Secretary, requiring that the three petitions at issue be excluded and thereby leaving Applicant without sufficient signatures to qualify for the ballot.

Applicant presents the question whether Maine's law as construed and applied should be reviewed and its enforcement enjoined because of an alleged violation of the First Amendment.

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, Respondent John Knutson respectfully requests that a stay of enforcement of the judgment of the Supreme Judicial Court of Maine sitting as the Law Court (hereinafter "Law Court") 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, be denied.

INTRODUCTION

There is no justification whatsoever for the extraordinary relief Applicant Hoffman seeks -- an order (in the nature of injunction or mandamus) that would require the State of Maine to include Applicant's name on the ballot for the U.S. Senate election in November of this year. *See Turner Broadcasting System, Inc. v. F.C.C.*, 507 U.S. 1301 (1993) (Rehnquist, C.J. in chambers) (describing standard for affirmative relief). Such an order would not merely preserve the status quo. It would permanently alter the

status quo by requiring that Applicant's name be included on the ballot in defiance of state law that the Law Court has conclusively interpreted as precluding his inclusion on the ballot, and in advance of any definitive adjudication of the constitutionality of that law. In such situations, a petitioner's legal entitlement to relief must be "indisputably clear," *id.*, and the equities must strongly favor relief. Applicant cannot come close to making that showing -- or even the less stringent showing needed to obtain a stay that preserves the status quo.

Wholly apart from the great intrusion on state sovereignty that would occur if Applicant were to receive the relief he seeks, Applicant advances no good reason why this Court should exercise its discretionary authority to grant such relief. The idiosyncratic and fact-bound question presented by Applicant does not remotely warrant plenary review by this Court. The Application does not identify any conflict between the Law Court's decision and the decision of any other state court of last resort or federal court of appeals. In fact, Applicant identifies no other case even addressing the issue of whether a ballot petition can be invalidated in its entirety based on a false oath. Nor is it plausible to suggest that the Law Court's decision conflicts with this Court's precedents governing state electoral procedures. To the contrary, this Court has repeatedly held that States have wide latitude to regulate the electoral process, subject only to a test of reasonableness -- which Maine's law easily meets. Maine election law reasonably requires a circulator to swear a factually accurate oath that all signatures on a nominating petition were collected in the presence of the circulator and provides that any petition sheets infected with an improper oath should be voided in their entirety. This circulator oath requirement and the penalty for violating the oath are the only safeguards of the

genuineness of the signatures set forth in the Maine statutory scheme for nomination by petition. Thus, Applicant cannot possibly demonstrate that it is "indisputably clear" that he is entitled to relief on the merits of this First Amendment claim -- or even that he has a reasonable prospect of success on the merits.

Finally, it must be noted that Applicant's entire claim for interim as well as permanent relief rests on the false premise that Maine law automatically invalidates ballot petitions in their entirety if any individual signature on the petition is invalid. As will be explained *infra*, that is simply not true. Maine law invalidates petitions in their entirety if the oath taken by the petition circulator is materially false. Maine law specifically exempts errors regarding the information provided by individual signatories on such petitions, and in those situations requires only that the individual names be stricken from the petition. But it does not contain a specific exemption for signatures obtained in violation of the requirement that the person circulating the petition be "present" and witness the signature -- a requirement that Applicant admitted he violated. Thus, the purported injury about which Applicant complains arises not from the oath requirement he challenges as unconstitutional but from the "presence" requirement that Applicant conspicuously acknowledges he is not challenging (*see* Application at 10) -- doubtless because it is a perfectly reasonable law.

Applicant's argument appears to be that Maine cannot require circulators of ballot petitions to swear an oath that they have complied with the admittedly reasonable presence requirement, and invalidate petitions based on false oaths, when the oath is false only with respect to a small number of signatories on the petition. But Applicant does not even attempt to articulate a principled justification for that conclusion, much less a

principled line that could be drawn between situations in which a false oath of compliance with the presence requirement can be a basis for invalidating an entire petition and situations in which it cannot. That is because no such basis exists in the law and no such line can be drawn. If, as Applicant concedes, the presence requirement is a reasonable regulation of the ballot circular process, then it is perfectly reasonable for the State to invalidate petitions based on a false oath of compliance with this requirement.

STATEMENT

A. Maine Election Law

In Maine law, section 354 of Title 21-A sets forth the requirements of the nomination by petition process. Section 354, sub-section (9) plainly provides that "a nomination petition which does not meet the requirements of this section is void." 21-A M.R.S.A. § 354(9). One of the primary requirements of a nominating petition is the circulator's verification of each nomination petition. Section 354 (7)(A) unambiguously provides that 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.

Id. § 354(7)(A) (emphasis added). This [circulator's oath] requirement finds its foundation in the Maine Constitution, which, in almost identical language, requires that the circulator of a petition swore an oath verifying that each of the signatures was made in his presence. *See* Ex. A at 6. ME. Const. art. IV, pt. 3, § 20.[1] *Knutson v. Dept. of Secretary of State*, 2008 ME 124 at ¶11 (Ex. A at 6).

There is a limited exception in section 354, subsection (9), stating that "[i]f a voter or circulator fails to comply with this section in signing or printing the voter's name

[1] Me. Const. art. IV, pt. 3, § 20 reads as follows:

> "written petition" means one or more petitions written or printed, or partly written and partly printed, with the original signatures of the petitioners attached, verified as to the authenticity of the signatures by the oath of the circulator that all of the signatures to the petition were made in the presence of the circulator 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, and accompanied by the certificate of the official authorized by law to maintain the voting list or to certify signatures on petitions for voters on the voting list of the city, town or plantation in which the petitioners reside that their names appear on the voting list of the city, town or plantation of the official as qualified to vote for Governor. The oath of the circulator must be sworn to in the presence of a person authorized by law to administer oaths.

and address, that voter's name may not be counted, but the petition is otherwise valid."[2] *Id.* § 354(9). This shows that, the Legislature understood that § 354(9) worked to void entire petitions and have carved out an exception to prevent an individual signer's error (or the circulator's error when printing information associated with the signature) from invalidating an entire petition. The exception shows that the Legislature considered the impact of voiding a petition and made a conscious choice regarding when an exception to this consequence was consistent with the legislative purpose.

The oath is central to the integrity of a petition and the petition process. It is unsurprising, therefore, that no exception is made for failure to meet the "presence" requirement or for a defect in the integrity of the attestation to that requirement.

B. Secretary of State's Decision

In or around February, March, April, and May 2008, non-party nomination petitions were circulated throughout Maine in support of Applicant Hoffman. As part of the statutory process, each circulator was required to verify each nomination petition by swearing an oath before a notary public or similar public official that, among other things, all the signatures were signed in the circulator's presence. On or before May 27, 2008, approximately three hundred and fifty-five (355) of the Petitions were submitted to various municipal registrars and clerks for the purpose of certification of the names thereon. On or before June 2, 2008, the Petitions were submitted to the Department, which subsequently reviewed, accepted and filed them. It was determined that a total of four thousand one hundred and twelve (4,112) valid signatures – or one hundred and

[2] Another exception to the general rule of voiding the petition that is found in a plain reading of the statute is in section 354, subsection (2), which expressly states that signatures not made by voters of the relevant electoral division are void.

twelve (112) signatures more than the statutory minimum required to place Mr. Hoffman on the November 2008 ballot – were on the Petitions. (Ex. D at 7.)[3]

On June 9, 2008, pursuant to 21-A M.R.S.A. § 356(2), Mr. Knutson filed a challenge to the Department's certification of the Petition. On June 16, 2008, a testimonial hearing was held before the Department's designated hearing officer regarding the challenge. On June 19, 2008, the written Report of the Hearing Officer (the "Report") was issued. (*See* Ex. D.) By written decision dated June 23, 2008, the Department adopted the Report of the Hearing Officer and, accordingly, rejected the challenge brought by Mr. Knutson. (*See* Ex. C.)

The Report found that seventy-one (71) signatures on the Petition should be disqualified for the following reasons: duplicate signatures, unregistered voters, illegible signature, or improper or wrong address. The Report also found with respect to three (3) of the petitions that certain persons signing them had not been in the presence of the circulator, Mr. Hoffman, and therefore Mr. Hoffman "could not properly attest" that these voters had signed those petitions in his presence, as required by law. Nonetheless, the Hearing Officer declined to void the entirety of these petitions pursuant to § 354(9), concluding instead that the three (3) signatures specifically identified as having been made outside the candidate's presence should be invalidated, allowing the rest of each Petition to stand. The Report recommended that the challenge to the Department's certification be rejected because the Petitions (counting the three that were affected by the defective attestations described above, minus only the three (3) identified signers) contained a total of four thousand one hundred and thirty-eight (4,038) valid signatures.

[3] For the Court's convenience, Respondent will reference the exhibits attached to the Application. Additionally, Respondent will include Ex. L, Petitioner's Brief to the Law Court, and Ex. M, Transcript of the June 16, 2008 Secretary of State Administrative Hearing, a part of the record before the Law Court.

In the Report, the Hearing Officer found that at least three (3) persons were approached by persons, who were not Herbert Hoffman, to sign three (3) separate Petitions that were being circulated by Mr. Hoffman. Each of these three (3) persons did in fact sign the Petitions without Mr. Hoffman present. As required by the Petition forms, Mr. Hoffman, in each of these cases, subsequently swore an oath before a notary public 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." 21-A M.R.S.A. § 354 (7)(A).

For the reasons detailed below, the Report of the Hearing Officer correctly concluded that:

> In all three of these instances [Adams petition #285, Flack petition #257 and Woods petition #44] the Candidate either was not in visual contact with the voter or was not able to be aware that the voter was signing the petition; and thus, *the Candidate could not properly attest that these voters had signed in his presence* within the meaning of § 354, Subsection 7, paragraph A.

Ex. D at 6 (emphasis added).

In its decision, the Department adopted this finding without alteration, thereby agreeing with the Hearing Officer that, with respect to each of these three (3) petitions, the candidate could not have attested that the identified voters had signed in his presence. The ample record support for this factual finding is further summarized below.

Rep. Herb Adams testified that on April 19, 2008, Adams was approached by a gentleman who was not Mr. Hoffman, who asked him to sign Mr. Hoffman's petition. (Transcript of Selected Witnesses' Testimony, In re: Challenge by John Knutson to Nomination Petitions of Herbert Hoffman, Candidate for United States Senate, Administrative Hearing (June 16, 2008), Ex. M at 3-5 ("Transcript").) Adams did in fact

sign the petition and did not witness Hoffman anywhere in the vicinity. (*Id.* at 4-5). The person circulating the petition gave Adams a campaign pamphlet, which included a photo of Hoffman. (*Id.* at 6). Adams later met Hoffman at a separate event. (Ex. M at 5). The petition sheet, which includes Rep. Herb Adams's signature from April 19, 2008, is petition # 285 and includes twenty-eight (28) signatures. Mr. Hoffman was the identified "circulator" of this petition who gave oath that the petition was signed in his presence. *See* Ex. I, Petition #285.

Dan Flack testified that on April 16, 2008, Flack was at the Portland Post Office when he was approached by a woman who identified herself as Hoffman's daughter. (Ex. M 10). She asked Flack if he would sign a petition to put her father on the ballot and he agreed. (*Id.*) Flack signed the petition and did so without noticing anyone else in the vicinity. (*Id.*) The petition sheet, which includes Dan Flack's signature from April 16, 2008, is petition # 257 and includes twenty-three (23) signatures. Mr. Hoffman was the identified "circulator" of this petition who gave oath that the petition was signed in his presence. *See* Ex. I, Petition # 257.

John "Jack" Woods testified that on February 23, 2008, Woods was in attendance at the Camp Wellstone Campaign training. (Ex. M at 13). He spoke with a woman who identified herself as Mr. Hoffman's daughter and asked him to sign the petition. (*Id.* at 14). Woods signed the petition while Mr. Hoffman was four (4) to six (6) feet away with Mr. Hoffman looking in the opposite direction. (*Id.*) The petition sheet, which includes Woods's signature is Petition #44 and includes forty-three (43) signatures. Mr. Hoffman was the identified "circulator" of this petition who gave oath that the petition was signed in his presence. *See* Ex. I, Petition # 44.

Additionally, Mr. Hoffman, himself, testified that he used two (2) other people, Jeff McNeely ("in one instance") and Kim Hoffman (his daughter – "in perhaps 6-7 instances"), to circulate petitions and to collect signatures on his petitions, while he was technically the circulator of the petitions. (*Id.* at 24-25). While collecting signatures with these other persons, Mr. Hoffman testified that he and the other person would solicit signatures separately and carry their own clipboard and petitions.[4] (Ex. M at 74). Mr. Hoffman testified that he considered himself in a person's "presence" if he were ten (10) to fifteen (15) feet away. (*Id.* at 30).

At the Human Rights Rally for China on April 19, 2008, where Mr. Adams signed the Petitions, Mr. Hoffman testified that both McNeely and his daughter collected signatures, while Mr. Hoffman was the official circular of those petitions. (Ex. M at 33-35). Mr. Hoffman admitted that he may have allowed McNeely[5] and his daughter[6] to collect some signatures alone.

While collecting signatures with his daughter, she would "usually" turn and point to wherever her father was, identifying Mr. Hoffman for the signer. (Ex. M at 29). Mr.

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[4] Attorney Piper: "Why did you have multiple petitions going at the same time?"

Mr. Hoffman: That the way it is. I don't know – I really – Okay. I had an assistant. So, that is two Portland petitions.

Attorney Piper: "Okay, so you are doing one and your assistant is doing the other."

Mr. Hoffman: "Yeah."

5 Mr. Hoffman: "In the instance - there was just one instance with Jeff McNeally where he was reading. He had a petition that I had begun and while I was doing something – while taking a little break pulling out folders you know he gathered a few signatures and I took it back." (Ex. M at 34).

6 Attorney Branson: "Do you recall ever leaving [Kim Hoffman] at the post office to go do something else?

Mr. Hoffman: "I might have. I don't know.

…

Attorney Branson: "You mean to go to the bathroom?"

Mr. Hoffman: "That's correct." (Ex. M at 46).

Hoffman also testified that after a collecting event, he would discuss with his daughter "if she had any difficulty and usually there were no difficulties, usually amusing stories some times." (*Id.* at 36). Clearly, Hoffman was not close enough to his daughter and the signatories of the petitions on these occasions to have witnessed these difficulties and amusing stories.[7]

In the Hearing Officer's determination of whether Hoffman was in the "presence" of Adams, Flack, and Woods, as that term is connoted in the oath requirement of section 354(7)(A), the Hearing Officer agreed with Knutson that "[p]resence means physical proximity, but in this context it also connotes *awareness*." Ex. D at 5 (emphasis added)(citing the Black's Law Dictionary definition of "presence" – "close physical proximity coupled with awareness"). The Hearing Officer elaborated on this definition of "presence," stating:

> It is not enough for a circulator to be in the general area where signatures are being gathered. If he is too far away to see the voters sign their names, then he also cannot verify that each signature is the signature of the person whose name it purports to be.

Id.

Thus, the Report of the Hearing Officer correctly concluded that: "*the Candidate could not properly attest that these voters had signed in his presence* within the meaning of § 354, Subsection 7, paragraph A." *Id*. (Emphasis added).

C. Superior Court's Decision

[7] At the Hearing, Hoffman was provided with the opportunity to call both McNeely and his daughter, Kim Hoffman, to rebut the testimonies of Adams, Flack, and Woods, and to explain that there was not an improper pattern to Hoffman's use of "assistants" to circulate nomination petitions of which Hoffman was officially the circulator. However, Hoffman failed to call either witness. Petitioner attempted to subpoena Kim Hoffman to testify as part of the Department hearing of this matter. However, the Department's subpoena power could not extend into Kim Hoffman's home state of Connecticut.

On June 30, 2008, Mr. Knutson filed an action in the Superior Court, pursuant to M.R.Civ.P. 80B as modified by 21-A M.R.S.A. § 356(2)(D), requesting that the Court reverse the Department's certification of the Petitions. (App. at 57). On July 14, 2008, the Superior Court (*Marden, J.*) affirmed the Department's certification of the Petitions. (*See* Ex. B).

D. Maine Law Court Decision

Pursuant to 21-A M.R.S.A. § 356(2)(E), Mr. Knutson timely appealed to the Law Court. On July 28, 2008, the Law Court issued an opinion deciding to vacate the Superior Court's judgment and remand to the Superior Court to vacate the Secretary of State's decision. *See* Ex. A.

Like the Superior Court, the Law Court agreed that the term "presence" was ambiguous and deferred to the Secretary's reasonable construction, requiring both "physical proximity" and "awareness." Ex. A at 5-7. As Applicant notes in his Emergency Application, no party had disputed this issue on appeal. App. at 10.

The Law Court also agreed that Applicant's oath on each petition at issue was inaccurate, as three specific signatures were gathered outside of his presence. Ex. A at 8. In determining the extent of Applicant's violation of the circulator's oath, the Court also considered the following concessions of Applicant from the record:

(1) [T]here were times when he used the assistance of another person to collect the signatures for which he was the circulator;

(2) [H]is daughter used a separate clipboard to collect signatures when he was the circulator;

(3) [H]e thought that being within ten or fifteen feet of his noncirculator "assistant" was acceptable;

(4) [A]nother individual gathered a few signatures while he, Hoffman, was engaged in dealing with other responsibilities; and

(5) [H]e "might have" left his daughter alone for a brief period to collect signatures while he was otherwise engaged.

(Ex. A at 8-9).

In determining the remedy for the violation of the oath requirement, the Law Court concluded that the relevant Maine statutory language is unambiguous and plain on its face. Ex. A at 10. "A nomination petition which does not meet the requirements of this section is void." *Id.*, quoting 21-A M.R.S.A. § 354(9). The Law Court recognized that the Maine Legislature did not condition the application of [section 354(9)] on the presence of fraud, nor did it create an exception for a failure to comply that is done in good faith. *Id.*

The Law Court rejected several arguments advanced by Applicant and the Secretary to avoid the plain result of the law. First, the Law Court upheld the constitutionality of the remedy of voiding an entire petition sheet when there has been a violation of the oath requirement. (Ex. A at 11). Second, the Law Court outright rejected Applicant's assertion that the circulator's oath and elements verified through that oath are not requirements of the nomination by petition process in section 354, stressing that the circulator's oath is "pivotal" to the circulation process. (Ex. A at 12). Third, the Law Court rejected the Applicant's and the Secretary's contention that the making of an honest oath is all that is required of section 354(7), even if it is inaccurate, if no fraud is involved. The Law Court concluded that "whether errors are made in good faith, or are the product of fraud or dishonesty, the law requires the invalidation of the petition upon demonstration of noncompliance, regardless of scienter." (Ex. A at 13). The Law Court held that the absence of fraud does not preclude the possibility that entire petitions may be stricken.

The Law Court concluded that "the three petitions at issue do not meet the requirements of section 354 because they contain circulator's oaths that are inaccurate as to a critical component of compliance with section 354, that is contact with, and signatures by, *all* voters in the 'presence' of the circulator." (Ex. A at 14-15). Therefore, a plain reading of section 354(9), which states that "a nomination petition which does not meet the requirements of this section is void," compelled the Law Court decision to void the petitions at issue.

E. Applicant's Motion for a Stay Filed with the Law Court

On August 6, 2008, Applicant filed a motion with the Law Court to stay its mandate. *See* Ex. E. On August 13, 2008, Knutson filed an opposition to Applicant's motion to stay. *See* Ex. G. On August 14, 2008, Applicant filed a supplemental statement in further support of his motion. *See* Ex. H.

ARGUMENT

I. The Harm Alleged by Hoffman is Counterbalanced by Harm to the Public and Furnishes no Basis for a Stay

While it is no doubt possible that Mr. Hoffman would sustain some harm if his application is denied, if denial of a place on the ballot can be considered cognizable harm when the putative candidate fails to comply with legal requirements for ballot access, any such harm must be balanced against the stay's effect on the public interest. *See Campos v. City of Houston*, 502 U.S. 1301 (1991) ("The issuance by a circuit justice of a stay pending appeal calls for consideration of not only the probability that the district court was wrong, but also the nature of (including responsibility for) the alleged injury that will occur absent a stay, *and the effect that a stay would have upon the public interest*") (citing *Republican State Comm. of Arizona v. The Ripon Society Inc.*, 409 U.S. 1222, 1224 (1972) (emphasis added).

The relief Mr. Hoffman seeks threatens harm to the integrity of the electoral process and the right of the electorate to have valid ballot restrictions upheld and enforced. If Mr. Hoffman is wrong on the merits, placing his name on the ballot would certainly inflict harm on the electorate and the state. Having litigated and *lost* in the State's highest court, Mr. Hoffman should not be permitted to throw Maine's electoral process into chaos based on the microscopic possibility that he could somehow prevail on an appeal he has not yet even filed. The potential for confusion is further illustrated by the difficulty of answering the Circuit Justice's question concerning the practical effect of a stay, as discussed in Part II, below.

Although Hoffman asserts that Maine voters would be harmed absent a stay, in truth, the public interest would be harmed to an equal or greater degree should a stay be granted. The Legislature has spoken on the question of how signatures to put prospective candidates on the ballot are to be gathered, its directive has been upheld by the Law Court, and a stay would contravene the Legislature's determination (as interpreted by the Law Court) as to the proper procedure for gathering signatures. *See Maine Taxpayers Action Network v. Secretary of State*, 2002 ME 64, ¶18, 795 A.2d 75, 78-79 (2002) ("We are . . . cognizant, as the United States Supreme Court has stated, that, 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'") (citing *Storer v. Brown*, 415 U.S. 724 (1974)). Maine's Legislature has defined the public interest. The public interest would *not* be advanced by an election required to be conducted at odds with the rules the people's representatives have established and would be harmed by the disorderly election process that would ensue should a stay be granted.

Hoffman also offers creative suggestions about the potential harms that might arise from omitting his name from the ballot. These possible harms all have their mirror image in the harm to other candidates and the electorate if his name is on the ballot and it is subsequently held that it should not have been. Thus, these speculative problems arising from this pending question during an election cycle cannot be resolved by a stay or injunction.

II. A Stay of the Law Court's Mandate, Without More, Will Not Result in Placement of Applicant Hoffman's Name on the Ballot, and Mr. Hoffman's Process for an Entitlement to the Additional Relief Necessary is Unclear

The Circuit Justice has asked the parties to address the practical effect of a stay, without more, of the Law Court's judgment. Because of the nature of the proceedings below, the practical effect of a stay may well be complete legal confusion about the appropriate content of Maine's Senatorial ballot, which the Secretary has indicated by affidavit must be finalized by August 29. This confusion arises because the proceedings below were fundamentally proceedings to consider and resolve a question of state statutory construction and application, questions not within the purview of this court, even though some parties to the state proceedings made references to and derived statutory construction arguments from federal constitutional concepts.

As discussed more fully in the Statement *supra*, this matter made its way to the Law Court because the Secretary of State, in acting on a challenge to Mr. Hoffman's ballot petitions, relied on its erroneous construction of 21-A M.R.S.A. § 354(9), which provides that if a circulator fails to meet the requirement of swearing or affirming truthfully that "all of the signatures to the petition were made in the circulator's presence [etc.]" then the defective nomination petition "is void." The Secretary declined to void petitions with defective oaths, instead ruling that the statute only required that the individual signatures that rendered the oaths false should be stricken from the petitions for purposes of counting the number of signatures. After an intermediate appeal to the Maine Superior Court, the Law Court ultimately reviewed the statute and the statutory construction arguments made by all parties and concluded that the three petitions at issue did not meet the requirements of § 354 "because they contained circulators oaths that are

inaccurate as to a critical component of compliance with § 354, that is, contact with and signatures by *all* voters in the 'presence' of the circulator." Knutson at ¶ 28 (Ex. A). Accordingly, the Court held that "the petitions at issue are void."

Although the Secretary and Hoffman argued for more convoluted interpretations of the statute, in part by suggesting that some constitutional issue might arise if the statute were construed in accordance with its plain meaning as the Law Court did, this state court's underlying final decision presents its unequivocal reading of an applicable Maine statute as requiring the invalidation of the entire petition sheet affected by a false oath of compliance. The state court was resolving an issue of state law, over which the United States Supreme Court has no authority. Given that this is how Maine law has been and will be construed, and that the Secretary of State has a constitutional duty to adhere to that law, a stay of the Law Court's judgment will not, without more, provide the Secretary with power to certify signatures that are contained on the void petitions.

While this Court may find that the statute itself, as interpreted by the Law Court, is either constitutional or unconstitutional if it accepts a petition for certiorari when and if it is filed, even Mr. Hoffman has conceded in the Law Court that he does not intend to challenge the Law Court's interpretation of the statute in this Court. *See* Hoffman's Supplemental Pleading filed with the Law Court, Docket No. KEN-08-375 2008, Exhibit H, at 8 ("as was made crystal clear in his initial motion for stay, and the attached emergency application to the United States Supreme Court, Mr. Hoffman is *not* seeking review of this Court's determination that Maine law mandates the voiding of an entire petition in the event that the circulator's oath, although made honestly and in good faith, is later found to be 'inaccurate' with regard to a single signature. . . . Rather, the

question for the United States Supreme Court is whether the applicable statutory provisions . . . , as construed in the above described manner . . . violates the first amendment rights of Maine citizens who seek to engage in political expression or association. . . .").[8]

Hoffman, and perhaps the Secretary, may contendthat a stay issued by this Court of the Law Court's mandate, which will reverse the Superior Court and direct the Secretary of State to act in accordance with the Law Court opinion, would leave "in place" the Secretary's determination that Mr. Knutson's challenge had failed, and that Mr. Hoffman's name should therefore be on the ballot. The situation, however, is more complicated than that. As with so many legal questions, this issue has not been decided in Maine. However, it must be noted that the Secretary of State is a creature of Maine's Constitution[9] and statute charged with the administration of certain of Maine's laws, including the instant ones. The issue now is whether the Secretary of State can lawfully proceed to place Mr. Hoffman's name on the ballot, when an unchallenged and unchallengeable interpretation of the very law that he is obligated to faithfully administer tells him that Mr. Hoffman's name should *not* be on the ballot, because to do so would violate Section 354(9).

The Secretary of State is not a judge. He cannot "invalidate" a Maine statute because the U.S. Supreme Court might some day determine that it is unconstitutional. He is obligated to administer the statutes as he understands them or, if decided by the State's

[8] This constitutional issue was raised, if at all, only obliquely by Mr. Hoffman's brief to the Law Court, which simply urged the Law Court to do what the Superior Court had done, and that is to err on the side of inclusion in the face of what Mr. Hoffman wrongly believed was an ambiguous Section 354(9). Nowhere did Mr. Hoffman argue that, if the Law Court *agreed* with Mr. Knutson's interpretation of the statute, then the statute was unconstitutional, or why. *See* Hoffman Brief to the Law Court, Exhibit J, at 18-21. The issue was presented somewhat more directly by the Secretary.

[9] ME. Const. art. IV, pt. 2.

highest court, as the court has interpreted them. *See*, *e.g.*, Me. Const. art. IV, pt. 2, § 4 (the Secretary "shall carefully . . . perform such other duties as are enjoined by this Constitution, or shall be required by law.") For the Secretary of State, therefore, to proceed to prepare ballots with Mr. Hoffman's name on them would violate his constitutional duty to administer the laws of the State. It appears, therefore, that Mr. Hoffman cannot have the relief that he seeks, which is to have his name placed on the ballot, without the issuance of an order in the nature of writ of mandamus, rather than a mere stay.[10]

Because Maine's highest court has now construed a plainly worded statute in accordance with its state law principles of construction, any preexisting conceptual framework for validating Hoffman's petition, based on a misunderstanding of the statute, can no longer lawfully be applied by the Secretary of State. Because the Secretary does not himself have law-making authority in the absence of enabling legislation, the only way to provide definitive guidance if the Law Court's mandate is stayed would be for this Court to fashion some sort of mandatory relief, which would go far beyond preserving the status quo prior to the Law Court's statutory construction opinion. This Court does not enjoin the effect of state statutes lightly. Indeed, in denying an application for an injunction, Chief Justice Rehnquist noted:

> Judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires.

[10] Respondent Knutson notes that no petition for mandamus has been filed with this Court.

Turner Broadcasting System Inc., v. FCC, 507 U.S. 1301, 1303 (1993) (citing *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2, 13 L. Ed. 2d 12 (1964).

Further, Chief Justice Rehnquist noted that:

> An injunction is appropriate only if (1) it is necessary or appropriate in aid of [our] jurisdiction, and (2) the legal rights at issue are indisputable clear.

Id.

Here, as further explained below, it instead appears that the Court will ultimately conclude, if it even grants certiorari, that Maine's scheme for regulations falls well within constitutional parameters. Accordingly, it is inappropriate for this Court to fashion an elaborate mandatory injunction requiring the Secretary of State to ignore the Law Court's interpretation of the underlying statue and instead to place Hoffman's name on the ballot pursuant to some scheme of certification fashioned by this court as a form of equitable relief.

III. There Is No "Fair Prospect" That Hoffman Would Prevail If Certiorari Were Ultimately Granted In Response To His Intended Petition, Nor is A Grant of Certiorari Reasonably Probable.

Hoffman contends in his Emergency Application that he has a "fair prospect" of ultimately prevailing on the merits because Maine's election law cannot survive Constitutional scrutiny by this Court. Hoffman's argument on the merits, however, rests on cases in which this Court has struck down state laws that it found to be undue burdens on the process of circulating petitions in electoral contexts. By contrast, the statutory scheme in Maine falls well within this Court's holdings that states may engage in substantial regulation of elections, provided that they do so in non-discriminatory ways, designed to avoid chaos and ensure orderly and fair democratic processes. Contrary to

the characterizations in Mr. Hoffman's Application, Maine's law as construed by its highest court constitutes a reasonable regulatory measure that does not violate the First Amendment rights of Hoffman or the people of Maine.

A. Maine's Statute Is a Proper Exercise Of Its Legitimate Interest In Regulating Ballot Access And Is Not Unconstitutional.

This Court has held that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Toward that end, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways … the selection and qualification of candidates." *Id*. Of specific relevance to this case,

> [t]he [Supreme] Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.

Bullock v. Carter, 405 U.S. 134, 145 (1972) (citations omitted).

Consistent with these observations, Maine's Law Court has explained the overall petition process of which the challenged statute is a part as follows:

> The process of challenge to nomination petitions is designed *to prevent circumvention of the petition requirements* … and is the only screening of third-party candidates comparable to the nomination/primary/convention/testing of major party candidacies. It is thus an important procedure that cannot be said unfairly to burden political opportunity.

Crafts v. Quinn, 482 A.2d 825, 831 (Me. 1984) (citation omitted) (emphasis added).

This Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v.*

Celebrezze, 460 U.S. 780, 788, n.9, 103 S. Ct. 1564, 1570, n.9 (1983) (citing *Jenness v. Fortson*, 403 U.S. 431 (1971) (Upheld Georgia law requiring that independent candidates collect the number of signatures on nomination petitions equal to 5% of the votes case in the last election); *American Party of Texas v. White*, 415 U.S. 767 (1974) (Upholding constitutionality of statute governing ballot access requirements for minority political parties). "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Id*.

As Hoffman notes, this Court has held that the circulation of direct initiative petitions is "core political speech," *Meyer v. Grant*, 486 U.S. 414, 421-422 (1998). Further, any state regulation of the initiation process must be justified by a compelling state interest and be narrowly tailored to serve that interest. *Buckley v. American Constitutional Law Found., Inc*., 525, U.S. 182 at 192 n.12. However, when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and the Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788)).

Maine's law is indeed narrowly tailored and serves compelling state interests. Hoffman's Stay Application contends that the rule to be challenged in its Petition for Certiorari is a requirement "that one invalid signature on a nomination petition requires the voiding of the entire petition and every valid signature on it," arguing that this is a severe burden on independent candidates. This characterization of the rule, however, lifts

it out of its context as a scheme for regulating the integrity of the electoral process and assuring that ballot access is determined in an orderly and fair manner.

Viewed in statutory context, Maine's law calls for the voiding of a petition sheet not because something is wrong with a single signature but because the *oath* reasonably required of the circulator of that sheet *is false*, thus failing to assure, as the statute requires, that the petition was circulated in accordance with the safeguards of the electoral process provided in Maine law. As the Law Court noted in deciding this matter, section 354(7)(A) of the statute requires the circulator of a petition to swear or affirm 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," along with certain other requirements not pertinent to this particular case. This provision of Maine statute is modeled on a nearly identical provision of the Maine Constitution governing petitions for initiated bills. The reasonableness and evenhandedness of Maine's nomination petition law, including the provision emphasizing the importance of the circulator's oath, is further illustrated by reviewing the history of Maine's laws on this subject. In 1961, LD 1614 created what would later become section 354 (7)(A) in Title 21-A P.L. 1961, Ch. 360 § 1. It required that "a signer of a nomination petition or the person who circulates it shall certify his belief that [A] *the signatures are genuine* and [B] *that they are residents of the electoral division*." (Emphasis added). The signer or circulator was required to certify the nomination petition by making an oath to the above statements either on the petition or an attached certificate. The current oath language of section 354 (7)(A) was added by the 108th Legislature in LD 1872 in 1977. P.L. 1977, Ch. 425 § 2. LD 1872 modified the

first portion so that, rather than attesting that "the signatures are genuine," the circulator swore that "all of the signatures to the petition were made in his presence and that to the best of his knowledge and belief each signature is the signature of the person whose name it purports to be." LD 1872 did not substantively modify the second requirement from LD 1460. It did, however, add a requirement that "the registrar of each municipality…certify which names on a petition appear on the voting list of that municipality as registered voters." The Statement of Fact for LD 1872 clarified that "the purpose…is to revise the petitioning process by establishing certification on the local level by the registrar. By implementing this procedure much of the controversy surrounding the petitioning process every year will be remedied." Thus, the Legislature intended to rely on the local town registrar to certify that the signatures were all registered voters in the district. The Legislature did not provide a similar "check" on the first requirement of section 354 (7)(A) concerning the genuine nature of the signatures. Certainly, had there been a concern regarding the adequacy of the oath, LD 1872 would have provided an additional process to verify the signatures' authenticity. Instead, it appears that the Legislature intended to avoid adding any such burden to the process, relying solely on the oath to establish the genuine nature of the signatures.

The importance of this oath and its consistent, reasonable application to electoral processes is further illustrated by the Legislature's reliance on this oath as a requirement for several types of petitions in Title 21-A.[11] In fact, the Legislature has expressed its intent to create a uniform process for verification and certification of various citizen petitions all of which include a common oath. In 1977, the Statement of Fact included

[11] These include primary (Section 335), non-party nomination (Section 354), and citizen initiative petitions (Section 902).

with LD 1872 suggested that one intent behind the bill was that it would "lend uniformity and consistency to both [primary and nomination] petitioning processes." Later, in 1998, the Legislature again sought to unify the petition processes, this time with respect to the citizen initiative petitions.[12] Procedural uniformity was achieved by adopting an approach already in use by the Department of Secretary of State. Indeed, during the hearing regarding LD 1917, Julie Flynn, the Director of the Department's Corporations, Elections, and Commissions, testified that "our office drafted this legislation to help clarify and improve several sections of the election laws…Our office has followed these procedures in certifying initiative petitions for many years, but this…places our interpretations and procedures into the statutes." *See* Flynn Testimony before the Joint Standing Committee on Legal and Veterans' Affairs (January 13, 1998). Taken together, the Department's own procedures, section 902, and section 354 (7)(A) create a uniform process for verification and certification of primary, nomination, and citizen initiative petitions. In 1961, LD 1460 also included subsection XI, which stated that a nomination petition which does not meet the requirements of this section is void. Subsection XI included the predecessor to the current exception in section 354, subsection (9), stating "[i]f a *voter* fails to comply with this section in signing the petition his name may not be counted, but the petition is otherwise valid." (Emphasis added). The exception, therefore, originally only referred to the failures of the voter (signer) and not the circulator in meeting the petition requirements. Therefore, any failures of the circulator to comply with the petition requirements necessarily fell under the general rule of having the effect of voiding the petition. Later, in 1977, in LD 1872, the Legislature created the

[12] "The petitions must be signed, verified and certified in the same manner as are nonparty nomination petitions under section 354, subsections 3 and 4 and subsection 7, paragraphs A and C." PL 1997, ch. 581, § 5, creating 21-A M.R.S.A. § 902 ¶ 2.

modern language currently found in section 354(9), which included the circulator in the exception language, but only as far as the circulator's failures in the printing of the voter's name and address. This inclusion of the circulator in the exception did not, therefore, alter the original intent that a failure of a signer could not void the entire petition, but a failure of the circulator (with the narrow exception concerning voters' names and addresses) could void the petition.

Here, the challenger of Mr. Hoffman's nomination papers, Mr. Knutson, established, with respect to three petition sheets, that the circulator's oath was untrue. The Secretary of State found after hearing that this oath was incorrect with respect to at least one of the signatures on each of these three petition sheets. Certainly, establishing that one signature violated the requirements of the law and that the circulator nonetheless swore that *all* signatures did comply with the law calls into question the reliability and validity of the document on which that oath was subscribed and sworn. Thus, the Legislature's requirement that a petition failing to have a valid oath is void is a consequence reasonably related to the infraction of election law that has occurred.

The record below establishes that Mr. Hoffman, who was in fact the circulator in this instance, handed petitions on which he subsequently swore the oath to other persons, who circulated these sheets to collect some of the signatures. Maine law does not burden the petition circulation process by requiring that the candidate collect all signatures personally and allows the use of assistants. However, unlike Mr. Hoffman's practice, each of these "assistants," or circulators as they are in the statute, is required to verify the particular nominating petition that the assistant is circulating by swearing the petition oath. As Hoffman's application rightly notes, therefore, limiting the signatures on a

given sheet to ensure that the oath properly applies to all of them would be one reasonable strategy to employ to assure compliance with the law. Hoffman incorrectly contends that such a strategy shows the process to be unfair or an undue burden on the circulation process. To the contrary, it illustrates that requiring the oath of each circulator of each petition is good policy that is easily complied with: it protects Maine voters by reducing the number of erroneous signatures, guards against misrepresentations, and confirms that the signatures on a given sheet were obtained according to law, by delegating the task of assuring compliance to the circulator of each sheet. It provides these safeguards without creating a burden such as requiring each person signing a petition to appear before a voting registrar or other state official to confirm the signature. Instead, it relies upon the circulator's assurance that the signatures were actually being observed as a sufficient safeguard.

B. The Opinions Relied Upon By Hoffman Address Burdens Fundamentally Different From The Maine Petition Law

Hoffman pins his request for a stay on a series of cases in which state laws regulating the circulation of ballot access petitions were held to be unconstitutional. In each of these cases, however, *the substantive provision of the state law at issue imposed an actual burden* on petition circulators. *See* Stay Application at 25-26, citing *Buckley v. American Constitutional Law Found., Inc.* 525 U.S. 182 (1999) (Colorado statutes requiring petitioners to be registered voters, wear nametags, and list their income if the petitioner is paid); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001) (Illinois statute requiring that petitioners gathering signatures be registered voters); *Pérez-Guzman v. Garcia*, 346 F. 3d 229 (1st Cir. 2003), *cert. denied*, 541 U.S. 960 (2004) (Puerto Rico statute requiring that each individual signature be

formally notarized by an attorney); *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir.), *petition for cert. filed* (U.S. Aug. 4. 2008) (No. 08-151) (Ohio statute making it a felony to pay petitioners on a per-signature basis or on any basis other than time worked); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (Arizona statute requiring that petition circulators be residents of the state and that nomination petitions be filed with the State no later than 90 days prior to the primary election); *On Our Terms '97 PAC v. Secretary of State of Maine*, 101 F. Supp. 2d 19 (D. Me. 1999) (Maine law prohibiting payment of petition circulators on the basis of the number of signatures collected). In each of these cases, a substantive statutory provision regulating the signature-gathering process was struck down because it imposed a burden on petition circulators that was deemed to be unconstitutional, either because it made the process more complex and cumbersome (the notarization requirement in *Perez-Guzman*), or more expensive and less efficient (the ban on paying signature gatherers on a per-signature basis in *Citizens for Tax Reform*), or by reducing the pool of potential signature gatherers (the exclusion of non-voters or non-residents in *Krislov*, or of people wishing to remain anonymous in *Buckley*).

Hoffman argues that the burdensomeness of the Maine statute is increased as a result of what he describes as Maine's "strict definition of 'presence.'" Stay Application at p. 18. Hoffman later concedes, by contrast, that Maine's presence requirement – the substantive provision at issue in this case – *is constitutional*. *See* Application at 21 ("Hoffman does not dispute that the State of Maine may … refuse to count any signature that is not made in the presence of the circulator ….").[13] In other words, Hoffman does

[13] The presence requirement was never challenged by Hoffman during the proceedings in state court. As the Law Court notes with regard to the Secretary of State's analysis of the "presence" requirement in the

not argue that the presence requirement itself imposes an unconstitutional burden on the signature-gathering process. Rather, what he claims is unconstitutional is the penalty for failure to observe the (constitutional) presence requirement: the invalidation of petition sheets that bear a false oath because one or more signatures were not affixed in the presence of the circulator. *See* Application at 21.

Here, in contrast to the cases Hoffman cites, no one is burdened unless they fail to observe a simple, constitutional rule. The penalty to which Hoffman objects only applies to circulators who do not play by the rules. Since the presence requirement itself is easy to comply with, the sanction the Legislature has crafted for *violations* is in no way akin to the rules struck down in the cases Hoffman relies on, where *compliance with the statutory requirements themselves* (not just the penalties for noncompliance) was found to impose an unconstitutional burden on petition circulators.

C. Hoffman Asks this Court to Consider a Novel Constitutional Theory, Never Clearly Articulated or Addressed in the State Proceedings

Hoffman asserts on page 19 of his Stay Application that Maine has imposed an unconstitutional burden on voters who may "have their signatures nullified, through no fault of their own, if an invalid signature happens to appear on the petition they signed." But the same could be said ("nullified, through no fault of their own") if Hoffman had inadvertently turned in three petition sheets a day late, thus violating the statutory deadline for submitting signatures – each person who had signed these three petitions would have their signatures nullified, through no fault of their own, because Hoffman had made an innocent mistake in handling the particular petition sheets they happened to have

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statute, "this analysis is eminently sensible, and not directly challenged by any party." *Knutson v. Dept. of Secretary of State*, 2008 ME 124 at ¶ 13. (slip Opinion at 7) (July 24, 2008).

signed. *This is exactly what happened in this case*. In the hypothetical example, no one would claim there was a constitutional violation, because it is understood and accepted that innocent mistakes such as missed deadlines sometimes result in significant consequences. But if the presence requirement by itself is constitutional, as Hoffman concedes it is (*see* Application at 21), then this case is identical for constitutional purposes to the hypothetical – in each case, all signatures on a petition are invalidated due to an innocent mistake by the circulator that could easily have been avoided.

The reason there is no constitutional violation in rejecting signatures on petitions that are submitted after the deadline is that *the timeliness requirement itself imposes no unreasonable burden on the signature-gathering process*. Likewise here, the presence requirement itself imposes no unreasonable burden, but if one fails to comply with it, the consequence may be that otherwise valid signatures are invalidated due to the happenstance of their having been affixed to one of the three petition sheets that were submitted late.

The general point is this: if a rule imposes no unconstitutional burden, the fact that the penalty for violating the rule may be burdensome does not make the rule or the penalty unconstitutional. If, as Hoffman would have it, the Constitution requires not only that the rules themselves not impose a burden, but that *one must be permitted to break non-burdensome rules without being subject to burdensome sanctions*, then anything goes. This analysis simply cannot be correct.

It is, of course, theoretically possible that a constitutional claim could be lurking somewhere in the facts of this case. But if Hoffman does have a constitutional claim, it must necessarily be a novel one, without precedent in the caselaw. Morever, *he never*

articulated this novel constitutional claim below. It is instructive that the best Hoffman can say in his own Stay Application as to whether the constitutional issue was raised below is that Hoffman argued before the Law Court that "due respect for the constitutional rights of voters implicated by the electoral petition process weighs strongly against invalidation of entire petitions," and "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." (Quoted in Application at 13.) Equally telling is that the best Hoffman can say about the Secretary of State's brief to the Law Court is that it talked about "a regulation that significantly burdens First Amendment rights" (quoted in Application at 12) (recall that Hoffman himself concedes that the regulation at issue in this case *is not unconstitutional*.) *See* Application at 12.

If Hoffman wished to invoke what he appears to be advancing now as a new constitutional doctrine of unconstitutional penalties for violations of constitutional rules, he was obligated to present this new doctrine to the Law Court. His failure to do so is explained by the fact that this was a statutory interpretation case in the Maine state courts, not a First Amendment case (which is why the Law Court's discussion of the constitutional issue was, as Hoffman observes, "perfunctory" (Application at 3)).

Hoffman also cites a number of state court cases on pages 27-29 of his Stay Application, in support of the assertion that Maine is "unique in its severity" because "[o]ther states would not have voided Hoffman's petitions in their entirety," these cases have no bearing on the constitutional argument Hoffman advances in his Stay Application, as they are not First Amendment cases, but state law statutory interpretation cases. (See Application at 28-29 citing *In re Nomination Petition of Tony Payton, Jr.*,

945 A.2d 162 (Pa. 2008); *North West Cruiseship Ass'n of Alaska, Inc. v. State of Alaska*, 145 P.3d 573(Alaska 2006); *State ex rel. Donofrio v. Henderson*, 211 N.E.2d 854 (Ohio Ct. App. 1965); *In re Initiative Petition No. 272*, 388 P.2d 290, (Okla. 1964), *State ex rel. Jensen v. Wells*, 281 N.W. 99 (S.D. 1938). Of course, this case too was a state law statutory interpretation case, not a First Amendment case – until Hoffman lost the statutory construction argument and then recast his arguments as if the Constitutional argument had been raised directly rather than being asserted as a guide for resolving supposed ambiguities that the Law Court found were nonexistent.

D. Hoffman Attaches Undue Significance to the Absence of a Defense of the Maine Statute by the Secretary of State

Repeatedly in his argument supporting a stay, Hoffman attaches significance to the fact that the Secretary of State has not defended the Maine statute as construed by the Law Court in its pleadings. Hoffman quotes a number of statements of the Secretary's counsel suggesting that the result reached by the Law Court would be constitutionally suspect or otherwise unreasonable and contends that it would be novel for this Court to uphold a statute that the responsible state official was not defending. These arguments, however, ignore the unusual posture of this case. This is not a lower court proceeding in which the constitutionality of Maine's ballot access process was squarely challenged. Instead, these were proceedings in which Hoffman relied on a preexisting interpretation of Maine law applied by the Secretary of State, and the challenger, Knutson, contended that the Secretary's reading of the law was contrary to its plain meaning. Ultimately, Maine's highest court agreed with Knutson, construing the statute to void the petitions at issue. Along the way, the Secretary, Hoffman, and an intermediate court made various

references to constitutional concepts, by way of suggesting that the most direct and obvious reading of the statute was not the best one, because it *might* run afoul of federal constitutional concepts. This indirect and referential discussion of the federal constitution never put the Secretary of State in the position of squarely responding to whether Maine law – as now declared by Maine's highest court – actually offends the First Amendment. As discussed elsewhere in this memorandum, it does not. Because the Secretary never had the opportunity, given the posture of this case, to respond directly to that question, it is unsurprising that the Secretary offers no defense. As discussed in Part 3 of this Memorandum, however, Maine's statutory scheme falls well within constitutional perameters.

CONCLUSION

For the foregoing reasons, Hoffman's Emergency Application for a Stay of Enforcement of the Maine Supreme Court's Judgment should be denied.

Respectfully submitted,

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Dated: August 19, 2008

CERTIFICATE OF SERVICE

I, Charles F. Dingman, a member of the bar of this Court, hereby certify that on this 19th day of August, 2008, a copy of the foregoing Memorandum in Opposition to 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:

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

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