

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-20-95

ALLIANCE FOR RETIRED AMERICANS
DOUG BORN, DON BERRY and
VOTE.ORG,
Plaintiffs

v.

**DECISION ON MOTION FOR
PRELIMINARY INJUNCTION**

MATTHEW DUNLAP
Maine Secretary of State, and
AARON FREY, Maine Attorney
General,
Defendants

and

DONALD J. TRUMP FOR PRESIDENT, INC.,
REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL
COMMITTEE, and REPUBLICAN PARTY
OF MAINE,
Intervenor-Defendants

AMERICAN CIVIL LIBERTIES UNION OF
MAINE FOUNDATION and MAINE
CONSERVATION VOTERS,
Amici Curiae

INTRODUCTION

This matter is before the court on the Plaintiffs' Motion for a Preliminary Injunction seeking to have the court declare that certain provisions of Maine's Election Code (Title 21-A) are unconstitutional in light of the COVID-19 pandemic and amid questions as to the ability of the United States Postal Service to deliver

absentee ballots in a timely fashion. The Plaintiffs seek to enjoin the Secretary of State and Attorney General from enforcing or applying certain provisions of Maine law, while they also request a mandatory injunction requiring the Secretary of State to perform certain acts that are arguably not consistent with current law. Given the limited time before the November 3, 2020 general election, the court will dispense with a lengthy explanation of the procedural history of this case or a detailed description of the extensive evidence (both documentary and live testimony) presented during the hearing on the Plaintiffs' Motion for Preliminary Injunction held on September 21, 2020. Nevertheless, the court has heard and reviewed the live testimony of Professor Michael Herron, Ph.D. of Dartmouth College and that of former Deputy Postmaster General Ronald Stroman. The court has reviewed, multiple times, the exhibits admitted at the hearing, namely, Plaintiffs' Exhibits 1-42, Defendants' Exhibits 1-17, and Intervenor's Exhibits 1, 2 (pages 45-47 only), and 3-4. The court will make any necessary findings of fact to elucidate its conclusions. Oral argument on the motion was heard on September 22, 2020. The following brief procedural background is provided in order to place the claims and arguments advanced by the Plaintiffs (and Amici) in context.¹

PROCEDURAL BACKGROUND

On June 24, 2020, the Plaintiffs filed their complaint in this action. The detailed complaint was 55 pages in length and contained 232 numbered paragraphs. The Plaintiffs, a non-profit social welfare organization, a non-profit, non-partisan voter registration organization, and two individuals, have challenged numerous provisions of Maine's Election Code pertaining to voter registration and absentee

¹ Amici Curiae, ACLU of Maine and Maine Conservation Voters, have also raised an intriguing argument based upon Art. I, § 1 of the Maine Constitution, that Maine voters have a state constitutional right to vote "safely." None of the Plaintiffs, however, have embraced that argument and the court, although it has considered the argument, will not discuss it further.

ballots. On August 7, 2020, the Plaintiffs moved for a preliminary injunction against the Secretary of State and the Attorney General. In essence, the Plaintiffs' arguments may be summarized as follows.

In normal times, the various aspects of Maine's election laws that are challenged in this litigation, would be viewed as relatively benign and would impose no constitutionally significant burden on the right to vote or the right to organize and associate for political purposes. The times we are living in, however, are by no means normal. Due to the health risks associated with the COVID-19 global pandemic and the more recent issues surrounding changes at the USPS that might affect delivery of the mail for the November 3, 2020 general election, the Plaintiffs contend that the challenged provisions of Maine law now impose "severe," and for some, insurmountable burdens on their ability to cast a valid vote at that election. The court has been asked to declare the challenged provisions of Maine law unconstitutional for the November 3, 2020 election only, and to enjoin the Defendants from applying the law or to do certain acts that the law presently proscribes. In particular, the Plaintiffs challenge the following aspects of Maine's Election Code:

Voter Registration Laws

- A. The Plaintiffs challenge the requirement, as interpreted by the Secretary of State, that voter registration forms be completed and signed in ink and submitted on paper, rather than electronically. 21-A M.R.S. §152(1) & (5).
- B. The Plaintiffs challenge the requirement, as interpreted by the Secretary of State, that first-time voter registrants provide photocopies of certain identification documents, if they are registering by mail. 21-A M.R.S. § 122(5).

Absentee Voter Laws

- A. The Plaintiffs challenge the prohibition against paid absentee ballot collectors. 21-A M.R.S. § 791(2)(A). They also challenge one of the options available to return an absentee ballot, which involves the presence of a notary, a clerk or two witnesses. 21-A M.R.S. § 754-A(2).
- B. The Plaintiffs challenge the requirement that to be valid, an absentee ballot must be “delivered to the municipal clerk at any time before the polls are closed,” i.e., 8:00 p.m. on election day. 21-A M.R.S. §§ 755 & 626(2).
- C. The Plaintiffs challenge those provisions of Maine law providing for the rejection of an absentee ballot because it: (a) was unsigned; (b) contained what appeared to be a mismatched signature, or (c) was otherwise defective. 21-A M.R.S. §§ 756 & 759. In particular, the Plaintiffs challenge the lack of any statutory procedure to notify absentee voters of a defect with their ballot envelope or affidavit or to provide an opportunity to correct or cure the defect.
- D. The Plaintiffs challenge the lack of any provision in Maine law that requires the government to pay the postage for the return of an absentee ballot. The Plaintiffs assert that this burdens their right to vote and also constitutes a “poll” tax under the 24th Amendment to the United States Constitution.

THE PRELIMINARY INJUNCTION STANDARD

A party seeking injunctive relief by a temporary restraining order or a preliminary injunction has the burden of demonstrating to the court that four criteria are met. The moving party must demonstrate that: (1) it has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); (2) it will suffer irreparable injury if the injunction is not granted; (3) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; and (4) the public interest will not be adversely affected by granting the injunction.

Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res., 2003 ME 140, ¶ 9, 837 A.2d 129.

The Law Court has also instructed that in the case where a request for injunctive relief has “mandatory aspects” to it, the burden of proof is even higher. *See Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989) (“Because the requested preliminary injunction had mandatory aspects, the [plaintiff] had to show a clear likelihood of success on the merits, not just a reasonable likelihood”).

The court does not consider these criteria in isolation, but weighs them together to determine whether injunctive relief is appropriate to the specific circumstances of the case. *Id.* Nevertheless, “[f]ailure to demonstrate that any one of the criteria is met requires that injunctive relief be denied.” *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10. It has been observed that “historically, the Maine courts have taken a conservative attitude towards injunctions, holding the injunction to be ‘an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case.’” *Saga Communs. of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 19, 756 A.2d 954 (quoting Andrew H. Horton & Peggy L. McGehee, MAINE CIVIL REMEDIES § 5.1, at 5-2 to 5-3 (1991)).

Likelihood of Success on the Merits

The Plaintiffs’ claims that various provisions of Maine’s Election Code are unconstitutional (at least for the November 3, 2020 general election) must be evaluated in light of the familiar principle that “all acts of the Legislature are presumed constitutional.” *Bouchard v. Dep't of Pub. Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92 (internal quotation marks omitted). One who claims that a statute is unconstitutional has a “‘heavy burden’” of showing that there “‘are ‘no circumstances in which it would be valid.’” *State v. Weddle*, 2020 ME 12, ¶ 12, 224 A.3d 1035 (quoting *Conlogue v. Conlogue*, 2006 ME 12, ¶ 5, 890 A.2d 691).

Moreover, in the particular context of this challenge to the validity of Maine's code governing how elections in this state are to be conducted, the United States Constitution expressly grants to the Legislature the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to the power of Congress to regulate in this area. U.S. Const. Art. I, § 4, Cl. 1. The parties appear to agree that, for the most part, the analysis this court must employ is articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), commonly referred to as the *Burdick/Anderson* standard of review.

In *Anderson*, the Court reaffirmed that state election laws can burden two separate, but overlapping, rights, namely, the right to associate to advance political beliefs and the right of voters to effectively cast their votes. 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). While recognizing that these rights are "fundamental," the Court also pointed out that not all restrictions imposed by state election laws "impose constitutionally suspect burdens on voters' rights." *Id.* at 788. This is so because "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). Accordingly:

To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson, 460 U.S. at 788.

There is no “litmus paper test” to distinguish valid from invalid election law restrictions. *Id.* at 789. Rather, the *Anderson* Court described a process by which a court “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.” *Id.* Next, “the precise interests put forward by the State as justifications for the burden imposed by its rule” must be identified and evaluated. *Id.* As part of this calculus, a court must not only assess the “legitimacy and strength” of the State’s interests, but also “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.*

In *Burdick*, the Court rejected the suggestion that every voting regulation be subjected to a strict scrutiny analysis, requiring that the regulation be narrowly tailored to advance a compelling governmental interest. To insist that state election regulations meet such a high standard “would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433. Rather, under the standard explicated in *Anderson*, the level of scrutiny depends upon the extent to which First and Fourteenth Amendment rights are burdened. *Id.* at 434.

Thus, as we have recognized when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’ But when a state election law provision imposes only ‘reasonable nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.

Id.

More recently, the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), a case in which Indiana’s voter identification law was upheld, emphasized that a reviewing court “must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then

make the ‘hard judgment’ that our adversary system demands.” *Id.* at 190. Any burden, “[h]owever slight” it might appear, must be “justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Id.* at 191.

The First Circuit Court of Appeals has described the tension between holding free and open elections and the need to regulate those elections in order to avoid utter confusion.

Fair, honest, and orderly elections do not just happen. Substantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos. Consequently, there is a strong state interest in regulating all phases of the electoral process

Perez-Guzman v. Gracia, 346 F.3d 229, 238 (1st Cir. 2003).

It is for this reason that the *Burdick/Anderson* line of analysis has sometimes been referred to as a “sliding scale” standard of review, because the court must weigh the nature and magnitude of the burden on the right to vote by a state’s regulation against the nature and strength of the state’s interest served by that regulation. With this background in mind, the court now proceeds to evaluate the particular provisions of Maine’s Election Code that are challenged here by the Plaintiffs.

Voter Registration

The Plaintiffs challenge two aspects of Maine’s voter registration law. The first, referred to as the “pen and paper” requirement, is based on 21-A M.R.S. § 152(1), which permits a person to register to vote by completing an application that contains the “signature” of the voter. The Plaintiffs challenge the Secretary’s interpretation that the “signature” must be an original, inked signature. The second law challenged by the Plaintiffs is based on 21-A M.R.S. § 112-A and is referred to as the “photocopier” requirement. The Plaintiffs challenge the Secretary of State’s instruction on the voter registration form that requires first-time registrants who register by mail to include a “photocopy” of certain types of identification.

A. “Pen and Paper” Requirement

Title 21-A M.R.S. § 152(1) provides that a person may register to vote by completing an application containing a number of items of information about the voter. The application must contain the “signature” of the applicant. 21-A M.R.S. § 152(1)(K). The Secretary of State has construed this requirement to mean an original, inked signature. The Plaintiffs have described this requirement in the following terms:

To register to vote remotely, the Secretary requires voters to complete a mail voter registration form and return a paper copy of the form signed in pen ink to the voter’s local election official. As a direct result, a Mainer seeking to register remotely must have access to a computer printer, or must engage in a multi-day, multi-step process of requesting the delivery of a voter registration application from their town clerk. Once the voter prints or receives the paper application, they must complete it, sign it, and then obtain an envelope and a stamp to mail it back. These additional steps make it less likely that Mainers will register to vote.

Pls.’ Mem. at 4.

The Plaintiffs, and Vote.org in particular, argue that Maine should adopt an online voter registration procedure using an electronic signature.

The Secretary counters that Maine’s voter registration system is simple and easy to use, as reflected by the fact that 96% - 97% of eligible voters in Maine are registered. Moreover, an inked signature supports a significant governmental interest in that it “is an important record for the municipal registrar to keep on file because it serves as a reference against which future signatures of the same voter are compared.” *Def.’s Ex. 6 (Flynn Aff.) at 4-5*. The Secretary has asserted that he has not found an electronic voter registration system that, so far, “would serve as an adequate substitute for the paper record.” *Id. at 6*.

The court finds that the “pen and paper” requirement for voter registration imposes a minor burden on the right to vote, which is clearly outweighed by the State’s important interest in an original, inked signature.

In the court’s view, Maine’s voter registration procedure is, indeed, simple and easy to follow. Although the Plaintiffs tend to describe the process as full of obstacles, it only requires an applicant to either appear in person to register or to complete the form and mail it with an inked signature. This can hardly be described as a severely burdensome process.

The Plaintiffs’ chief complaint is that an electronic signature is just as good as the pen and paper requirement. That policy argument, however, is one that the Legislature has already addressed. The Secretary of State may “design an application that can be completed electronically and that substantially meets the requirements of this section.” 21-A M.R.S. § 152(5). The court rejects the argument that the Secretary’s interpretation of current law as requiring an inked signature is wrong. On the contrary, the Secretary’s interpretation is reasonable and is consistent with the legislative language. The Legislature has granted the Secretary of State the authority to design an electronic application process, but has not mandated it at this time, leaving it to the Secretary’s discretion.

Finally, to the extent Vote.org contends that the “pen and paper” requirement violates its right to “core political speech,” the court is unpersuaded. The Secretary of State is charged with the responsibility of designing the voter registration application and nothing about the design of that application or the requirement of an inked signature limits any First Amendment free speech rights. *New Ga. Project v. Raffensperger*, 2020 U.S. Dist. LEXIS 159901, *71-72 (N.D. Ga. 2020).

As to the “pen and paper” requirement, the Plaintiffs have not shown a likelihood of success on the merits.

B. “Photocopier” Requirement

Those persons who are registering to vote for the first time must provide satisfactory proof of identity. *See* 21-A M.R.S. § 112-A. If the voter appears in person to register, there is no need to photocopy any documents. If the registration is done by mail, the Secretary of State instructs the voter to include a photocopy of one of the acceptable forms of identification such as a driver’s license, a state ID, a current utility bill or bank statement, or a government document “that shows your name and address.” *Def.’s Ex. 8* If the applicant fails to include such proof of identity with the mailed registration form, he or she may still show up on election day, provide the requisite proof of identity and then vote. 21-A M.R.S. § 121(1-A).

The Plaintiffs assert that a requirement to include a photocopy of identification documents is unnecessarily burdensome because the voter either has to own a copier, have access to one or travel somewhere to make a copy.

Once again, the court finds that any burden imposed by the “photocopier” requirement is minimal at best. The State has a strong interest in requiring proof of identity for first-time voter registrants. For those who choose to use the mail to complete the registration process, it is a minor but necessary inconvenience to include a copy of the identity document, which can be viewed by the local election official if the registration is done in person. Moreover, the provisions of Maine law on the subject of proof of identity appear entirely consistent with federal law. *See* 52 U.S.C. § 21083. *See generally Crawford*, 553 U.S. 181; *Democracy N.C. v. N.C. State Bd. of Elections*, 2020 U.S. Dist. LEXIS 138492, *104-05 (M.D.N.C. 2020).

Absentee Ballot Regulations

The Plaintiffs challenge a number of provisions pertaining to absentee voting in Maine. These include: (A) the prohibition on receiving any compensation to deliver, receive, accept, notarize or witness an absentee ballot; (B) the requirement that if a third party, who is not an immediate family member, returns an absentee

ballot, the ballot must be signed before a court or municipal clerk, a notary or two other witnesses; (C) the requirement that a voter affix postage to an absentee ballot envelope, if the voter is using the mail to return an absentee ballot; (D) the rejection of absentee ballots involving “mismatched” signatures or other correctible defects, and the failure to provide a statutory procedure for notice to the voter of the rejection and an opportunity to cure the defects, and; (E) the requirement that an absentee ballot be “delivered” to the municipal clerk “before the polls are closed” in order for that absentee ballot to be valid.

A. 21-A M.R.S. § 791(2)(A) – The Ban on Compensation

Maine law makes it a Class D crime if a person “[d]elivers, receives, accepts, notarizes or witnesses an absentee ballot for any compensation.”² 21-A M.R.S. § 791(2)(A). The Plaintiffs complain that “[b]y prohibiting paid and trained organizers from providing this service and in the process, providing an additional check to ensure that the voter has signed their ballot envelope – the state has unnecessarily cut off an important avenue of assistance for voters.” *Pls.’ Mem. at 14.*

The court concludes that the burden on the right to vote imposed by the prohibition on “paid” handlers or collectors of absentee ballots is slight. Maine law provides a variety of methods for the return of an absentee ballot. The voter may return the absentee ballot in person, by mail, by depositing it into a secured lockbox, by having it delivered by an immediate family member,³ or by having it delivered

² This prohibition “does not apply to a governmental employee handling ballots in the course of that employee’s official duties or a person who handles absentee ballots before the unvoted ballots are delivered to the municipality or after the voted ballots are returned to the clerk.” 21-A M.R.S. § 791(2)(A).

³ The term “immediate family” is defined to mean “a person’s spouse, parent, grandparent, child, grandchild, sister, half-sister, brother, half-brother, stepparent, stepgrandparent, stepchild,

by someone else provided the ballot has been marked in the presence of a clerk, a notary or two other witnesses. 21-A M.R.S. § 754-A. In accordance with the Governor's Executive Order, a voter may also vote in-person by absentee ballot up until 5:00 p.m. on Friday, October 30, 2020. *Def.'s Ex. 4*.

In light of these alternatives, the slight burden on the right to vote imposed by the prohibition on paid deliverers of absentee ballots is clearly outweighed by the State's compelling interest in forbidding the payment of compensation to those handling another person's ballot. Such a prohibition serves the State's important interest in deterring and preventing election fraud.

The Plaintiffs have not shown a likelihood of success on the merits in their challenge to 21-A M.R.S. § 791(2)(A).

B. Absentee Voter Assistance

As noted above, Maine law allows the return of an absentee ballot in a number of different ways. It can be returned in person to the local clerk or to a secure lockbox. It can be mailed. It can be returned by an immediate family member, the definition of which is quite broad. If a person chooses not to use any one of these methods, the voter's absentee ballot may be delivered by any other third person provided the voter marks the ballot in the presence of a municipal clerk, a clerk of courts, a notary or two other witnesses. 21-A M.R.S. § 754-A(2)(A).

The Plaintiffs attack this optional method of delivering an absentee ballot on the following basis:

. . . requiring voters who need assistance to recruit multiple individuals to witness the ballot adds a burdensome, unnecessary, and now dangerous step to returning absentee

stepgrandchild, stepsister, stepbrother, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, guardian, former guardian, domestic partner, the half-brother or half-sister of a person's spouse, or the spouse of a person's half-brother or half-sister. 21-A M.R.S. § 1(20).

ballots. The State has no sufficient justification for imposing such burdensome hurdles on returning ballots.

Pls.’ Mem. at 14.

In support of their position, the Plaintiffs rely upon *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003). But *Gracia* involved a requirement that all signatures on a petition to form a new political party in Puerto Rico had to be sworn to before a lawyer-notary. Similarly, other cases where a witness requirement was found to be a severe burden on the right to vote (during the COVID-19 pandemic), involved a witness requirement for all absentee ballots. *See, e.g., League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 U.S. Dist. LEXIS 152120, *8-9 (W.D. Va. 2020) (consent agreement); *Common Cause R.I. v. Gorbea*, 2020 U.S. App. LEXIS 135267, *2 (D.R.I. 2020) (consent agreement); *Mich. Alliance for Retired Americans v. Benson*, 20-000108-MM (Mich. Ct. of Claims 2020) (as applied challenge based on Michigan’s constitutional right to vote absentee). *But see Democracy N.C. v. N.C. State Bd. of Elections*, 2020 U.S. Dist. LEXIS 138492, *103 (M.D.N.C. 2020); *New Ga. Project v. Raffensperger*, 2020 U.S. Dist. LEXIS 159901, *69-70 (N.D. Ga. 2020).

Maine law, however, does not require an absentee voter to have any witnesses. Utilizing the services of a clerk, a notary or two other individuals, as allowed by section 754-A(2)(A), is simply another option for an absentee voter to use in deciding how to return the ballot. The State has a strong interest in deterring and preventing fraud in connection with the handling of absentee ballots. Although there has been considerable discussion and debate about the prevalence (or lack thereof) of voter fraud, there can be no question as to the State’s compelling interest in reasonably regulating how a ballot is handled, and by whom, when the voter chooses not to appear for in-person voting. *See State v. Sproul*, 544 A.2d 743, 744-46 (Me. 1988) (tampering with absentee ballot).

Given the numerous alternatives available to an absentee voter to return the voter's ballot that do not involve the need for any witnesses, the burden is minor and is outweighed by the State's strong interest.

As to the witness assistance provision in 21-A M.R.S. § 754-A(2)(A), the Plaintiffs have not shown a likelihood of success.

C. First Class Postage Requirement

If a Maine voter wishes to vote absentee and also wishes to return the ballot by using the United States Postal Service, the voter must affix sufficient postage. The State of Maine does not pay for such return postage and the Election Code does not mandate that local municipalities pay for it either.

The Plaintiffs contend that the failure of the government to pay the postage for the return of an absentee ballot imposes a severe burden on the right to vote. They also assert that it constitutes a Poll Tax in violation of the Twenty-Fourth Amendment to the United States Constitution. In sum and substance, the Plaintiffs maintain that obtaining and paying for postage during the COVID-19 pandemic and the well-publicized difficulties being experienced by the Postal Service, has "exacerbated" the burden of paying for postage and will deter people from voting, either by mail or by going to the polls where they may risk in-person interactions and exposure to the coronavirus. *Pls.' Mem. at 10-11.*

This issue has been litigated in other courts throughout the nation. In every case of which this court is aware, claims similar to those being raised by the Plaintiffs have been rejected. Most courts have described the postage burden as, at most, moderate. In light of the alternatives to voting by mail, including in-person, by delivery of the ballot by an immediate family member, by depositing one's ballot into a secured lockbox or by delivery by some other third person, and given the State's strong interest in maintaining fiscal responsibility of taxpayer resources, the courts have concluded that the State's interests outweigh any burden on the right to

vote as a result of having to pay the postage to use the mail. The courts have also rejected the argument that paying for postage to mail an absentee ballot amounts to a Poll Tax. *See, e.g., Raffensperger*, 2020 U.S. Dist. LEXIS 159901, *63 (moderate burden); *League of Women Voters v. LaRose*, 2020 U.S. Dist. LEXIS 91631, * 21 (S.D. Ohio 2020) (minimal burden); *Black Voters Matter Fund v. Raffensperger*, 2020 U.S. Dist. LEXIS 143209, *104 (N.D. Ga. 2020) (moderate burden); *DCCC v. Ziriox*, 2020 U.S. Dist. LEXIS 170427, *68 (N.D. Okla., 2020) (light burden); *League of Women Voters of Mich. v. Sec'y of State*, 2020 Mich. App. LEXIS 4454, *34 (Mich. Ct. App. 2020) (minimal burden).

The court agrees with these decisions and concludes that paying for postage to return an absentee ballot by mail represents, at most, a moderate burden and, more likely, only a slight burden that is outweighed by the State's interest. Moreover, the court concludes that paying for such postage is not a Poll Tax.

The Plaintiffs have not shown a likelihood of success on the merits on their postage claim.

D. Notice of Rejection and Opportunity to Cure

Upon receiving a return envelope apparently containing an absentee ballot, the local municipal clerk must examine the envelope to determine if the signature on the envelope and the signature on the absentee ballot application “appear to have been made by the same person and if the affidavit is properly completed.” 21-A M.R.S. § 756(2). When it comes time to count absentee ballots, the election warden is directed to reject the absentee ballot envelope (without opening it) if: (a) the signatures do not appear to have been made by the same person or (b) the affidavit is not properly completed.⁴ 21-A M.R.S. § 759(3). A rejected ballot is not counted.

⁴ The term “[a]ffidavit, with respect to an absentee ballot envelope means that portion of the envelope that includes the voter’s signature, the aide certificate and the witness certificate.” 21-A M.R.S. § 1 (1-A)

21-A M.R.S. § 759(5). Maine law directs that an absentee ballot may not be rejected for any “immaterial irregularity in completing the application or affidavit on the return envelope.” 21-A M.R.S. § 762. Certain information, however, must be on the envelope for the ballot to be accepted, to wit: name and address, voter’s signature and witness signature, if required. *Id.*

There is no procedure spelled out in Maine’s Election Code that requires local election officials to notify an absentee voter that there is some type of defect with the absentee ballot envelope or affidavit such as, for example, the lack of a signature or signatures that appear mismatched. Nevertheless, within a matter of days after the complaint in this matter was filed, and in preparation for the July 14, 2020 primary election, the Secretary of State provided “instructions” to municipal election officials that absentee voters whose return envelopes or affidavits were defective for some reason, should be notified and given the opportunity to cure or correct the defect. The Secretary has refined those instructions for the November 3, 2020 general election. Those instructions were admitted into evidence as Defendants’ Exhibit 17.

The instructions embodied in Defendants’ Exhibit 17 provide detailed, step-by-step procedures for local election officials in the following situations: (a) mismatched signatures; (b) missing voter signature; and (c) defective aide or witness certificate that is incomplete or incorrect.

The Plaintiffs acknowledged during closing argument that the Secretary’s instructions are a substantial improvement over the absence of any statutory procedure for notification and opportunity to cure. They contend, however, that the instructions are merely guidance and the court should issue an order making them “binding” on municipal officials. In addition, the Plaintiffs argue that the instructions do not go far enough and should include a post-election day deadline cure opportunity.

There is a substantial body of caselaw addressing the issue of what procedural due process applies where there appears to be some type of curable defect on an absentee ballot envelope or affidavit. Most of that caselaw stands for the proposition that, at least where the defect is an apparent mismatch of signatures, the absentee voter is entitled to be notified of the defect and given the chance to correct it. *See, e.g., Frederick v. Lawson*, 2020 U.S. Dist. LEXIS 150995, *50-51 (S.D. Ind. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 2020 U.S. Dist. LEXIS 138492, *147-56 (M.D.N.C. 2020); *Self Advocacy Solutions, N.D. v. Jaeger*, 2020 U.S. Dist. LEXIS 97085, *29 (D.N.D. 2020); *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620, *16-26 (N.D. Fla. 2016); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1337-41 (N.D. Ga. 2018); *Raetzel v. Parks/Belmont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). *But see Memphis A. Phillip Randolph Inst. v. Hargett*, 2020 U.S. Dist. LEXIS 156759, *65-66 (M.D. Tenn. 2020).

In view of the fact that the Secretary of State has created a process to notify absentee voters of a defect on the envelope/affidavit, and to provide them with an opportunity to correct the defect prior to the close of the polls on election day, the court must decide whether that procedure provides adequate due process. The court is satisfied that it does. The Secretary's instructions direct, in bold-face type, that **"the clerk must make a good faith effort to notify the voter as quickly as possible (within one business day at a minimum) that the ballot may be rejected or challenged unless the defect is cured."** *Def.'s Ex. 17*. The instructions further state: "If the ballot is received on election day or less than 24 hours before election day, the clerk should make a good faith effort to notify the voter as quickly as possible." *Id.*

In the case of apparent mismatched signatures and the voter cannot be reached or does not cure the defect before 8:00 p.m. on election day (the close of the polls),

the ballot will be counted as a challenged ballot according to the procedure established in 21-A M.R.S. § 673.⁵ *See Def.'s Ex. 17*. In the case of a missing signature or an incomplete or incorrect aide or witness certificate, if the voter cannot be reached or does not cure the defect by the close of the polls on election day, the ballot will be rejected as required by 21-A M.R.S. §§ 759(3) & 762. Moreover, in the latter two situations, the voter, if reached, may take steps to cure the defect over the phone without having to come to the town office or to complete a duplicate ballot. When that option is used, the ballot will be counted as a challenged ballot.

The court finds that the Secretary's instructions and the process his office has developed to provide notice and an opportunity to cure or correct is adequate for procedural due process purposes. The Secretary's process emphasizes the need to notify a voter of a defect "as quickly as possible," and the instructions provide a variety of ways a defect can be cured. It is also significant to the court that the Secretary has launched an online absentee ballot tracking system that will allow voters who choose to take advantage of absentee voting to follow the journey of their ballot from the time of their request for an absentee ballot to its delivery and receipt by the clerk, including whether it has been rejected.

Procedural due process is a flexible concept and what process is due depends on what the particular situation demands. *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 13 (1st Cir. 2011). Three factors must be balanced; the private interest affected; the risk of erroneous deprivation of such interest through the procedures used, and the value, if any, of additional procedural safeguards, and; the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The

⁵ A "[c]hallenged ballot means a ballot cast by one whose eligibility to vote has been questioned during election day." 21-A M.R.S. § 1(7). A challenged ballot "must be counted the same as a regular ballot. The validity of a challenged ballot need not be determined unless it affects the results of the election." 21-A M.R.S. § 696(1).

interest affected here is significant as it involves the right to vote and to have one's vote counted. The Secretary's procedures for notification and an opportunity to cure have greatly reduced the risk of an erroneous deprivation. The court rejects the Plaintiffs' argument that the Secretary's process is not adequate because it does not include an opportunity to cure after the polls have closed, when the voter could not be reached or has otherwise failed to cure the defective ballot. This argument, in reality, is only applicable to defects other than apparent mismatched signatures, because in that case the ballot is counted as a challenged ballot if it has not been cured. Presumably, the Secretary's procedure treats mismatched signatures differently because the voter has complied with the law by delivering a completed absentee envelope and ballot before the close of the polls on election day and it contains a signature. Where the voter has not signed the ballot envelope at all or there is a defect in the aide or witness certificate that is not corrected by the close of the polls on election day, the ballot will be rejected because a completed envelope and affidavit has not been delivered to the clerk before the close of the polls. In those circumstances, there is a greatly reduced risk of an "erroneous" deprivation because the defects that remain uncured are not the result of a clerk's subjective opinion that signatures do not match.

As will be discussed further in the section of this Decision dealing with the Absentee Ballot Delivery Deadline (8:00 p.m. on election day), the State has a strong interest in its election day deadline. Balancing all the factors of *Mathews v. Eldridge*, the court finds that the Secretary's notification and opportunity to cure procedure as detailed in Defendants' Exhibit 17 provides adequate and appropriate due process under the circumstances.

The court sees no need to issue any type of order directed at the Secretary of State, Attorney General or local election officials to treat the instructions as "binding." The court is confident that the Secretary of State and the Attorney

General, both constitutional officers, will implement the Secretary's procedure and that local election officials will do so as well. Accordingly, the Plaintiffs have failed to demonstrate their entitlement to injunctive relief on this issue.

E. The Absentee Ballot Delivery Deadline

Maine law provides: "In order to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls are closed." 21-A M.R.S. § 755. Furthermore, by law "[t]he polls must be closed at 8:00 p.m. on election day" 21-A M.R.S. § 626(2).

The Plaintiffs have asked the court to declare that the Absentee Ballot Delivery Deadline is an unconstitutional burden on the right to vote in the November 3, 2020 general election. They are seeking to enjoin the Secretary of State and the Attorney General from enforcing the requirement that absentee ballots must be delivered before the polls are closed on election day. Instead, the Plaintiffs have asked the court to declare that, to be valid, an absentee ballot must be postmarked on or before election day and counted if it is delivered to the municipal clerk after election day. The Plaintiffs prefer at least 7 days after election day for absentee ballots to be counted, assuming they are postmarked by November 3, 2020, but they have essentially left the number of days up to the court.

The Plaintiffs contend that the COVID-19 pandemic will result in a massive surge in absentee voting and voting by mail in particular. Combined with the difficulties being experienced by the United States Postal Service in meeting its on-time delivery standards, the Plaintiffs argue that the COVID-19 pandemic has greatly amplified the burden on absentee voters who choose to use the mail to return and deliver their ballots. According to the Plaintiffs, the risk of disenfranchisement of absentee voters whose ballots are not delivered on time is "severe." The Plaintiffs contend that the unprecedented

circumstances in which the November 3, 2020 general election will be held has made the Delivery Deadline for absentee ballots unconstitutional because many voters will not have their votes counted due to lateness in their delivery to the town clerk.

The court is satisfied that absentee voting in Maine dramatically increased for the July 14, 2020 primary election. Indeed, over 182,000 voters (approximately 58% of all votes cast) chose to utilize absentee voting for that primary election. It is anticipated that at least an equal percentage of voters, (i.e., hundreds of thousands of Maine voters) will vote absentee and/or by mail for the November 3, 2020 general election. Further, the court has no doubt that this surge in absentee voting is the direct result of the COVID-19 pandemic. Voters in Maine have been strongly encouraged by their elected and appointed leaders to vote by absentee ballot and to do so as soon as possible once absentee ballots become available in early October.

The court is also satisfied that with the increased use of absentee voting in Maine for the general election comes the increased risk that some voters will fail to have their absentee ballots delivered on time so as to be counted. Precisely how many absentee votes will be rejected due to lateness is debatable – the Plaintiffs’ expert suggests somewhere in the area of 2400 or more, while the Defendants estimate 600-700.

The Postal Service’s on-time delivery standards call for first-class mail to be delivered in-state within 2 – 5 days. Mr. Stroman testified that he advises voters to mail an absentee ballot at least 7 days before election day in order to make sure it is delivered by the close of the polls.

The Plaintiffs acknowledge that in normal times – pre-COVID-19 – Maine’s Delivery Deadline is reasonable and non-discriminatory and imposes only a relatively light burden on the right to vote. During a viral pandemic

and delayed mail delivery, however, the Plaintiffs argue that the burden on the right to vote is severe and not justified by a compelling state interest.

The court agrees that COVID-19 and the issues with the Postal Service have complicated voting in the year 2020. The court is not convinced, however, that Maine's Delivery Deadline is the cause of any increased burden on the right to vote. The Delivery Deadline has been in existence for many years and, as far as the court can tell, has never been viewed as imposing an unreasonable burden on the right to vote. It is a deadline, and just like any deadline, there can be serious consequences if it is not met.

Courts that have considered the constitutionality of delivery or receipt deadlines for absentee ballots have reached different conclusions for different reasons. Some have agreed with the Plaintiffs that a deadline for the delivery or receipt of an absentee ballot is a severe burden on the right to vote that cannot be justified by any compelling governmental interest. As a result, those courts have judicially modified the statutory deadlines, typically by ordering that absentee ballots be counted if they are postmarked by election day and received within a certain period of time (usually a week) afterwards. *See, e.g., New Ga. Project v. Raffensperger*, 2020 U. S. Dist. LEXIS 159901, **88-90 (N.D. Ga. 2020); *Democratic Nat'l Comm. v. Bostlemann*, 20-CV-249-WMC (W.D. Wis. 2020); *Pa. Democratic Party v. Boockvar*, J-96-2020 (Pa. 2020) (invoking its "extraordinary jurisdiction" and at the request of the Secretary of State); *Mich. Alliance for Retired Americans v. Benson*, 20-000108-MM (Mich. Ct. of Claims 2020) (based on Michigan's constitutional right to vote absentee and by mail); *Driscoll v. Stapleton*, DV-20-408 (13th Jud. Dist. Ct., Yellowstone Cty. 2020) (based on Montana state constitution).

The federal district court in Oklahoma, on the other hand, found the delivery deadline for absentee ballots to be "no more than a minimal burden

on voters,” particularly in light of the available options for voting on time. *Ziriaux*, 2020 U.S. Dist. LEXIS 170427, *25. The Court of Appeals in Michigan also ruled that the state’s election day receipt deadline was facially constitutional and did not place an undue burden on the right to vote absentee under the state constitutional provision guaranteeing the right to vote by mail. *League of Women Voters*, 2020 Mich. App. LEXIS 4454, *24, 26.

Of significance to the court is the fact that at least two of the cases in which the delivery or receipt deadline for absentee ballots was deemed to be a severe burden originated in states that had well-publicized problems in conducting primary elections earlier this year during the early stages of COVID-19, namely, Georgia and Wisconsin. By contrast, Maine’s July 14, 2020 primary election appears to have been conducted with little controversy. The Secretary of State and the Governor have promulgated detailed guidance, based on CDC recommendations, as to how polling places must be designed and arranged in order to mitigate exposure to COVID-19 during the general election. Local elections officials have taken the steps necessary to implement and enforce that guidance in preparation for the election, including limiting the number of voters at any one time and mandating social distancing and the wearing of face coverings. It is true, of course, that Maine has seen recent outbreaks of COVID-19 in certain areas of the State, but it remains the lowest, or next to lowest, State in its COVID-19 positivity rate as well as its death rate from the disease per 100,000 people. Moreover, the State of Maine, through the Attorney General, has joined in litigation in federal courts in Washington and Pennsylvania, and has obtained relief to enjoin the Postal Service from implementing changes to its policies and operations that may have contributed to mail delays.

The decision of the Pennsylvania Supreme Court ordering that a postmark date should replace the receipt deadline was at the request of the Secretary of State there. And the decision by a single judge of the Michigan Court of Claims was based on an “as applied” challenge to the receipt deadline, and the court there did not believe it was bound by the contrary decision of the Michigan Court of Appeals, which involved a facial challenge to the deadline. Finally, this court does find the recent decision of the Montana District Court persuasive, as the court there completely discounted the state’s interest in the integrity of elections and maintaining voter confidence in the integrity and legitimacy of elections.

The Plaintiffs claim that Maine law is out of alignment with the delivery standards of the Postal Service because it permits a voter to request and obtain an absentee ballot on the Thursday before election day (5:00 p.m. on October 29, 2020). Plaintiffs argue that an absentee ballot obtained that soon before election day cannot be mailed and be delivered by the close of the polls on November 3, 2020. But allowing voters to obtain an absentee ballot as close to election day as the previous Thursday is not necessarily tied to the use of the mail. Rather, it permits a voter to obtain an absentee ballot that can be delivered in person or to a secure lockbox or delivered by a third party. The fact that Maine allows voters to request and obtain an absentee ballot on the Thursday before election day does not somehow render Maine’s Delivery Deadline unconstitutional because the Postal Service cannot guarantee delivery through the mail by November 3, 2020.

After careful consideration of the evidence, the arguments of counsel and the relevant caselaw, the court finds that the Maine Absentee Ballot Delivery Deadline, even in 2020, imposes only a modest burden on the right to vote. As explained by the Michigan Court of Appeals:

We acknowledge that it [the receipt deadline] does affect when an absentee voter must mail their ballot so that it arrives by the deadline. But the fact that a voter must act sooner when they choose to mail in their ballot rather than deliver it does not deprive them of the choice; rather, it merely affects how and when that choice must be exercised.

League of Women Voters of Mich., 2020 Mich. App. LEXIS 4454, *17.

It is the Maine Legislature that has established the Absentee Ballot Delivery Deadline in 21-A M.R.S. § 755. It is perfectly sensible that there be a deadline of some kind: “Obviously . . . there must be a deadline – at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision.” *Id.* at *19. The Absentee Ballot Delivery Deadline does not exist in a vacuum. Rather, it is part of Maine’s comprehensive Election Code that contains a number of time-sensitive activities that elections officials must adhere to in order to make sure that the winners in an election are declared in a timely fashion and are seated.

For this court to unilaterally discard the statutory deadline and impose a deadline of its own choosing, would amount to a judicial re-writing of the election laws. Moreover, any deadline has aspects of arbitrariness to it, including one crafted by the court. Such a judicial modification of the deadline risks severe disruption of Maine’s electoral process, under circumstances where the burden on the right to vote as a result of the Delivery Deadline is slight. *See Ziriox*, 2020 U.S. Dist. LEXIS 170427, *31.

Because the State offers voters wishing to vote by absentee ballot options to ensure their votes are timely returned, voters who fail to ensure timely return of their ballots should not blame the law for their inability to vote. The Supreme Court similarly observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a late-requesting voter, not a burden imposed by the state law. An absentee voter is responsible for acting with sufficient time to

ensure timely delivery of her ballot, just as a voter intending to vote in-person must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot.

Id. at *58 (internal citations omitted)

The State has weighty interests that justify the Absentee Ballot Delivery Deadline. Clearly, the State has a significant interest in “providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v. Cox*, 885 F.3d 1219, 1228 (10th Cir. 2018). *See also Mays v. LaRose* 951 F. 3d 775, 792 (6th Cir. 2020); *Thomas v. Andino*, 2020 U.S. Dist. LEXIS 90812, *66-67 (D. N.C. 2020). Part of that important state interest is the need to secure and maintain voter confidence in the integrity and legitimacy of elections. A deadline such as Maine’s Absentee Ballot Delivery Deadline serves that interest by demonstrating to all voters that election day is a watershed event because it is the day when all votes are cast and counted. A judicial declaration that the statutory deadline is not really a deadline at all, and can be altered and extended for a week or more, risks undermining voter confidence that the law means what it says and that the voting and the election are over. In this court’s view, and based on the evidence presented in this case, a judicial extension of the statutory deadline is neither warranted nor appropriate.

Accordingly, the Plaintiffs have not shown a likelihood of success on the merits that the Absentee Ballot Delivery Deadline is unconstitutional.

Irreparable Harm, Balancing the Harms and the Public Interest

The court has already engaged in the balancing analysis required by *Burdick/Anderson*, and has concluded that the burdens on the right to vote imposed by the challenged provisions of Maine’s election laws are slight or moderate, and that the State’s interests outweigh any burdens. Furthermore, given the strength of the State’s interests, the court has already addressed why it would not be in the public

interest to grant injunctive relief as requested by the Plaintiffs. It would be unnecessarily redundant to repeat that analysis here. Suffice it to say that the court is not persuaded that withholding injunctive relief to the Plaintiffs will result in irreparable harm. Likewise, the harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote. Finally, it would not be in the public interest to grant injunctive relief against state officials responsible for the implementation and enforcement of Maine's election laws for the November 3, 2020 general election.

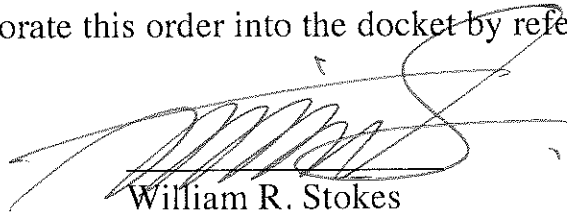
CONCLUSION

The entry is:

The Plaintiffs' Motion for a Preliminary Injunction is DENIED.

The clerk is directed to incorporate this order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Date: September 30, 2020



William R. Stokes
Justice, Superior Court