STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-AP-16-04

ROGER BIRKS, et al.,

Petitioners,

v.

SECRETARY OF STATE MATTHEW DUNLAP,

Respondent.

ORDER ON PETITION FOR REVIEW OF AGENCY ACTION

This matter came to the Business and Consumer Court along with *Greenlaw v. Secretary of State*, BCD-AP-2016-05 (Me. Super. Ct., Cum. Cty., April 7, 2016). The Petitioners in both cases challenged Determinations made by the Secretary of State that would keep two direct initiatives from being considered by Maine voters in the November 2016 election. In addition, Petitioners in both appeals challenged the Secretary of State's interpretation of 4 M.R.S. § 951-A.[1] The Court declined to address in *Greenlaw*

[1] In *Greenlaw*, the petitioners acknowledged that even if the Court agreed that the Secretary of State erred in his interpretation of the statute, they would still need an additional 7,346 signatures to qualify for placement on the November 2016 ballot. To make up for this shortfall, the *Greenlaw* petitioners raised arguments pertaining to other aspects of the process undertaken by

the issues regarding 4 M.R.S. § 951-A that it must address here in order to resolve the instant appeal.

In the current case, Petitioners challenge the Secretary of State's decision to invalidate 31,338 signatures notarized by five Notary Publics in support of a ballot initiative entitled "An Act to Legalize Marijuana". The Secretary of State determined that the signatures of these Notaries did not match the signatures maintained on file with his Office, and the Secretary could not determine, based on the signatures, whether the petitions were notarized by the respective Notaries.[2] For the reasons discussed below, the Court reverses the Secretary of State's determination and remands for further action consistent with this Order.

I. Background

In 2015, a number of Maine citizens began circulating petitions for voter signatures to trigger a statewide referendum on a Direct Petition for Initiated Legislation entitled "An Act to Legalize Marijuana" (the "Marijuana Petition"). On February 1, 2016, approximately 20,671 petitions containing 99,229 signatures were submitted to the Secretary of State in support thereof. On that same day, the Secretary of State received two additional citizen initiative petitions, and was already in the process of reviewing two

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the Secretary of State in making his determination. Only if the *Greenlaw* petitioners prevailed on those other issues could they qualify for placement on the ballot. The Court was not persuaded by these arguments and, as a result, determined that it need not, and should not, address the regarding 4 M.R.S. § 951-A.

[2] 9,541 of the 31,338 signatures invalidated for this reason were also deemed invalid for one or more additional reasons. Petitioners do not challenge the additional reasons for invalidating these signatures. Accordingly, Petitioners are functionally challenging the invalidation of 21,797 signatures.

other petitions.[3] (Flynn Aff. ¶ 5.) In order to complete a full review, the Elections Division of the Secretary of State recruited additional staff from the Division of

[3] The citizen initiative petitions before the Secretary of State were:

Citizen Initiative Petitions	**Date Submitted**	**Deadline for Secretary of State Determination**	**Number of Petition Forms**	**Total Number of Signatures**
Raise Minimum Wage	1/14/2016			

2/16/2016

13,212

86,438

Background Checks for Gun Sales

1/19/2016

2/18/2016

19,986

84,602

Advance Public K-12 Education

2/1/2016

3/2/2016

19,832

88,242

York County Casino

2/1/2016

3/2/2016

28,667

91,294

Marijuana Petition

2/1/2016

3/2/2016

20,671

99,229
Total

102,368
449,805

Corporations, UCC & Commissions and elsewhere in the Department of the Secretary of State.[4] (*Id.* ¶ 7.) The staff assisting with the review process were provided written instructions to guide and coordinate their review. (*Id.* ¶ 18; *see also* Record Document ("R. Doc.") 18.)

In order for the Marijuana Petition to be placed before the voters on the November 2016 Ballot, 61,123 valid signatures had to be filed with the Secretary of State by February 1, 2016. (R. Doc. 1, Determination of the Validity of a Petition for Initiated Legislation Entitled: "An Act to Legalize Marijuana" (the "Determination") ¶ 3); *see also* Me. Const. art. IV, pt. 3, §18(2).

On March 2, 2016, the Secretary of State issued the Determination, which found 47,686 signatures submitted in support of the Marijuana Petition were invalid. (R. Doc. 1, Determination ¶ 3.) This left a maximum of 51,543 valid signatures, 9,580 signatures short of the requisite 61,123.[5] (*See id.*) The Secretary of State determined, in pertinent part, that:

> 31,338 signatures are invalid because the circulator's signature on the circulator's oath or the signature of the notary listed as having administered the oath did not match the signature on file and it could not be determined that the signature was made by that person. (OATSIG) A single individual was listed as the notary on 5,099 petitions containing 26,779 of these signatures. 9,541 of the signatures in this category are also invalid for one or more of the reasons listed below….

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[4] Julie Flynn, the Deputy Secretary of State in charge of the Bureau of Corporations, Elections and Commissions, asserts that since the Secretary of State developed the review process currently in place, it has not received more than three citizen initiative petition filings to review simultaneously, let alone within the same 30-day period. (*Id.* ¶ 6.)

[5] The Determination notes that this number is subject to further reduction in the event additional duplicate signatures are found. (*Id.* ¶ 3.)

(*Id.* ¶ 2(A).)[6] If the Secretary of State erred in his "OATSIG" determination and all of the signatures invalidated solely for that reason are valid, the Marijuana Petition would qualify for placement on the November 2016 Ballot.[7]

Subsequent to the Determination, the Department of the Secretary of State clarified that none of the 31,339 signatures deemed invalid due to OATSIG were invalidated as a result of a circulator's signature not matching his or her signature on file with the Secretary of State. Instead, all OATSIG invalidations were "because it was not possible for us to determine that the commissioned Notary Public whose name appeared on these petitions actually administered the oath to the circulators of those petitions." (Flynn Aff. ¶ 18.) In other words, there is no claim by the Secretary of State that any of the circulators involved in the invalidated petitions did anything to fail to comply with the constitutional or statutory requirements to allow this initiative to be on the November 2016 ballot. The only issue before the Court is the findings made by the Secretary of State regarding the five Notaries.

Petitioners filed this action challenging the Secretary of State's March 2, 2016 Determination on March 10, 2016. Petitioners seek judicial review of the Determination

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[6] The "single individual" mentioned in the determination is Stavros Mendros. (*See* R. Doc. 7, Stavros Mendros Excel Spreadsheet.)

[7] This is because 61,123 valid signatures are required to qualify for the ballot. The Secretary of State, subject to further reduction due to duplication, determined that 51,543 signatures in support of the Marijuana Petition were valid. Thus, the Marijuana Petition needs 9,580 additional signatures to qualify for the November 2016 Ballot. The Secretary of State invalidated 21,797 signatures solely due to OATSIG and an additional 9,541 for OATSIG and other reasons. If the 21,797 signatures invalidated solely for OATSIG were improperly invalidated, the Marijuana Petition would have enough votes to qualify for placement on the November 2016 Ballot. It also bears noting that even if all 9,541 of the signatures invalidated for additional reasons came solely from petitions notarized by Mr. Mendros, a finding that the Secretary of State erred by invalidating these petitions due to OATSIG would result in an additional 17,238 valid signatures.

pursuant to 21-A M.R.S. § 905 and declaratory judgment that the Determination was in violation of the Petitioners' rights under the Maine and U.S. Constitutions. The administrative record was timely filed with the Court on March 21, 2016. An amicus brief was filed on March 24, 2016, Petitioners filed their appellate brief on March 25, 2016, the Secretary of State filed his brief on March 28, 2016, and oral argument was held before the Court on March 30, 2016.

II. Standard of Review

According to the Maine Revised Statutes, an action brought seeking review of the determination of the Secretary of State on Direct Initiative Petitions "must be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by this section." 21-A M.R.S. § 905(2) (2015). In *Palesky v. Sec'y of State*, the Law Court interpreted the modifications presented in section 905 to expedite the timing of the appeal. 1998 ME 103, ¶ 5, 711 A.2d 129. Section 905 does not require "a full de novo trial." *Id*. ¶ 6.

Accordingly, when reviewing a determination on a direct action petition made by the Secretary of State, the Court's review is "deferential and limited." *Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 5, 97 A.3d 115. The Court only reviews adjudicatory decisions "for abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record." *Wyman v. Town of Phippsburg*, 2009 ME 77, ¶ 8, 976 A.2d 985. The Court will "not vacate an agency's decision unless it: violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is

arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record." *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566.

The party attempting to vacate the agency's decision bears the burden of persuasion. *Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 10, 822 A.2d 1114. If the agency's decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision. *See Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. "An abuse of discretion may be found where an appellant demonstrates that the decision maker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Id.* Ultimately, the petitioner must prove that "no competent evidence" supports the agency's decision. *Seider v. Bd. of Examiners of Psychologists,* 2000 ME 206, ¶ 9, 762 A.2d 551 (citing *Bischoff v. Bd. of Trustees*, 661 A.2d 167, 170 (Me. 1995)). The mere fact that there is "[i]nconsistent evidence will not render an agency decision unsupported." *Id.*

Whether the Secretary of State exceeded his authority is a matter of statutory interpretation. *See Conservation Law Found. v. Dep't of Envtl. Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551. If the statute is unambiguous, the Court construes the plain language of the statute. *Guilford Transp. Indus. v. Public Utilities Comm'n*, 2000 ME 31, ¶ 11, 746 A.2d 910. If the statute is ambiguous, the Court defers to the expertise of the agency "unless the statute plainly compels a different result." *Berube v. Rust Eng'g*, 668 A.2d 875, 877 (Me. 1995) (quoting *Nielsen v. Burnham & Morrill,* 600 A.2d 1111, 1112 (Me. 1991)).

"A particular statute is not reviewed in isolation but in the context of the statutory and regulatory scheme." *Conservation Law Found.,* 2003 ME 62, ¶ 23, 823 A.2d 551.

III. Analysis

a. Whether Count II of the Petition Should Be Dismissed as Duplicative of Count I

The Secretary of State moves to dismiss Count II of the Petition—asserting violations of Petitioners' rights under the Maine and U.S. Constitutions—as duplicative of Count I, the M.R. Civ. P. 80C appeal from the Determination. He argues that while Count II purports to raise separate, constitutional claims, all of the relief sought by Petitioners "under Count II is available [through Count I] under 5 M.R.S. § 11007(4)." (Br. of Resp. 21); *see also Antler's Inn & Restaurant, LLC v. Dep't of Public Safety*, 2012 ME 143, ¶¶ 14-15, 60 A.3d 1248 (dismissing 42 U.S.C. § 1983 claim because M.R. Civ. P. 80C provided an adequate process for judicial review); *Kane v. Comm'r of the Health & Human Serv.s*, 2008 ME 185, ¶¶ 30-32, (finding no abuse of discretion to strike independent causes of action when claims are based on the same factual allegations and seek the same relief as M.R. Civ. P. 80C appeal).

Here, the Court agrees that Count II is duplicative of Count I because the arguments raised therein are appropriate for adjudication pursuant to M.R. Civ. P. 80C. In an appeal of agency action, the Court may "[r]everse or modify the decision if the administrative findings, inferences, conclusions or decisions are… [i]n violation of constitutional or statutory provisions." 5 M.R.S. § 11007 (2015). Accordingly, the Court

dismisses Count II of the Petition, but will address the constitutional arguments raised therein with its adjudication of Count I.

b. Motion to Take Additional Evidence

Petitioners move the Court—in the event it determines the Secretary of State reasonably found he could not confirm whether Mr. Mendros signed the petitions he claims to have notarized (the "Mendros Petitions")—to take additional evidence that the Mendros Petitions were, in fact, valid. Specifically, Petitioners seek to introduce affidavits from Mr. Mendros, two of the other Notaries whose signatures were disqualified due to OATSIG, and eight circulators who had Mr. Mendros notarize their petitions. Petitioners also seek to introduce the report of a forensic document examiner. The Secretary of State opposes the introduction of this evidence and, to the extent it is admitted, moves the Court to take additional evidence casting doubt on the evidence proffered by Petitioners.

5 M.R.S. § 11006(1)(B) authorizes the Court to take additional evidence if it determines said evidence is, among other things, "necessary to deciding the petition for review[.]" The determination of whether to take additional evidence rests within the discretion of the Court. *York Hosp. v. Dep't of Human Servs*., 2005 ME 41, ¶ 22, 869 A.2d 729 (citing *Murphy v. Bd. of Envtl. Prot.*, 615 A.2d 255, 260 (Me. 1992)).

Here, the Court determines additional evidence is not necessary to deciding the Petition. This is because the record, without the need for additional evidence, demonstrates that the Secretary of State committed an error of law by applying a vague,

subjective and/or unduly burdensome interpretation of 4 M.R.S.A. § 951-A to invalidate the OATSIG signatures.[8]

c. Petitioners' M.R. Civ. P. 80C Appeal

i. Maine Constitution

Article IV, part third, section 18 of the Maine Constitution provides the people of Maine with the right to legislate through the direct initiative. In order for electors to propose a bill, resolve or resolution to the Legislature, a petition must be filed containing the signatures of not less than 10% of the total votes cast for Governor in the last gubernatorial election. Me. Const., art IV, pt. 3, § 18(2). In 2014, there were 611,255 votes cast in the gubernatorial election. Direct initiative petitions filed in March of 2016 therefore needed a minimum of 61,123 signatures in order for the measure to be referred to the electors in November 2016. *See id*; (*see also* R. Doc. 1, Determination ¶ 3.)

In order for a petition to be considered valid and for the signatures on that petition to be counted towards the 61,123 necessary for referral to the electors, the circulator who has collected the signatures must take an oath "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." *Id*. at § 20. Furthermore, that oath must be "sworn in the presence of a person authorized by law to administer oaths." *Id.* Most commonly, a Notary Public administers the swearing of the oath by the circulator, but the Secretary of State acknowledges that

[8] The Court also notes that despite the parties' respective motions to take additional evidence, they urged the Court to expeditiously decide the Petition on the record as originally presented.

Maine attorneys at law are also authorized to administer such oaths and the Secretary of State does not maintain their signatures for comparison.

The role of the circulator in making assurances that, to the best of the circulator's knowledge, the signatures on the petitions belong to the named individuals is paramount to the integrity of the direct initiative process. Without assurances by the circulator, the Secretary of State does not have evidence to support a finding that the petitions were in fact signed by the requisite number of registered voters and that the signatures are not fraudulent. *See id.* The Maine Constitution incorporates the circulators oath to prevent fraud, "to assure that the circulator is impressed with the seriousness of his or her obligation to honesty, and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures". *Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶ 14, 795 A.2d 75. The Constitution is silent as to the oath administrator's signature.

The Law Court has taken the threat of fraud in the direct initiative process seriously. The Court has upheld statutes and determinations by the Secretary of State that invalidate petitions on the basis that the circulator was not a Maine resident (*Hart v. Sec'y of State*, 1998 ME 189, ¶ 13, 715 A.2d 165), the signatures were not filed on official petition forms (*Palesky v. Sec'y of State*, 1998 ME 103, ¶ 12, 711 A.2d 129), and the petitions were not reviewed and certified by the local registrar (Id. ¶ 13). All of these restrictions were found to implement the constitutional requirements of the direct initiative and to further the State's compelling interest in preventing fraud without impermissibly abridging the right to initiative.

The Law Court emphasized the importance of the circulator's oath in preventing fraud in *Maine Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, 795 A.2d 75. In that case, one of the circulators hired to collect signatures was an imposter who had stolen the identity of a man living in the state of Washington. *Id*. ¶ 4. The imposter used a stolen name, social security number, and birthdate in order to fraudulently register to vote, register a car, and get a driver's license. *Id*. The Secretary of State invalidated all of the signatures collected by the imposter because he swore to a false identity and therefore did not meet the Constitutional requirements of swearing an oath. *Id*. ¶ 6. The Law Court found that "the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator…. Thus, the circulator's oath is critical to the validation of a petition." *Id*. ¶ 13.

In 1909, Maine amended its Constitution to establish the referendum and initiative. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 101 (2d ed. 2013). Maine was one of the first states to provide its citizens with the ability to directly draft laws. *Id*. Since the creation of the direct initiative, the Law Court has stressed the importance of this Constitutional power reserved to the people, declaring it to be an "absolute right". *McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933. As an absolute right, the right to initiative may not be abridged either directly or indirectly. *Id.* ¶ 21. "The broad purpose of the direct initiative is the encouragement of participatory democracy. By section 18 the people, as sovereign, have retaken unto themselves legislative power and that constitutional provision must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to

legislate." *Id.* ¶ 25 (quoting *Allen v. Quinn*, 459 A.2d 109, 1102-1103 (Me. 1983)). "[S]ection 18 cannot be said merely to permit the direct initiative of legislation upon certain conditions. Rather, it reserves to the people the right to legislate by direct initiative if the constitutional conditions are met." *Id*. Furthermore, the Law Court has found that the right to circulate petitions in furtherance of a direct initiative is "'core political speech,' and any state regulation of the initiative process must be 'narrowly tailored' to carry out a compelling state purpose." *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 8, 795 A.2d 75.

ii. Role of Legislature

The Maine Constitution provides the Legislature with the power to draft and enact legislation "to establish procedures for determination of the validity of the written petitions." Me. Const. art. IV, pt. 3, § 22. However, any law enacted must be consistent with the constitutional right. *Id*; *see McGee*, 2006 ME 50, ¶ 20, 896 A.2d 933. While the legislature unquestionably has the right to draft legislation to implement the direct initiative, they are not required to do so. In the absence of legislation, the constitutional right is "self executing." Me. Const. art. IV, pt. 3, § 22.

Where a law would burden an absolute right, such as the right to initiative, the Court strictly scrutinizes the statute at issue. "Strict scrutiny requires that the State's action be narrowly tailored to serve a compelling state interest." *Rideout v. Riendeau*, 2000 ME 198, ¶ 19, 761 A.2d 291 (citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Butler v. Supreme Judicial Court*, 611 A.2d 987, 992 (Me. 1992)).

The statute before the Court is 4 M.R.S. § 951-A(1), which states:

> **1. Official signature.** When performing a notarization, a notary public must sign by producing that notary public's official signature by hand in the same form as indicated on the notary public's commission. For the purposes of this section, the notary public's official signature is the signature that appears on the notary public's most recent oath of office or most recent application for a notary public commission.

4 M.RS. § 951-A(1) (2015). Section 951-A became effective on September 12, 2009 as part of L.D. 379, "An Act To Amend the Notary Public Laws" (the "Act"). The Act was submitted by the Secretary of State and initially provided, in pertinent part:

> When performing a notarization, a notary public must sign in the notary public's own handwriting the notary public's official signature showing the name exactly as indicated on the notary public's commission….

(Attachment A to Br. of Resp. 4) (emphasis added).

On March 4, 2009, Representative Priest introduced Timothy Poulin, the Director of Corporations, UCC and Commissions within the Department of the Secretary of State, and Ms. Flynn to provide additional information regarding the Act before the Joint Standing Committee on State and Local Government. (*Id.* at 1.) Mr. Poulin's prepared written testimony explained that during the Department of the Secretary of State's recent certification of five citizen initiative petitions, he noticed that many of the notarizations were done by the same notaries and that some of those notaries provided signatures that varied widely. (*Id.* at 3.) This raised concerns that the Secretary of State could not tell whether the signature belonged to the Notary Public in question based on the face of the petitions, and further that the Secretary was not legislatively empowered to invalidate petitions based on facial inconsistency. (*Id.*)

Mr. Poulin attached examples of the signatures to his testimony, specifically samples of signatures from Notary Public Cynthia Bodeen when notarizing petitions (*Id.*

at 5), and when certifying her qualification to serve as a Notary Public (*Id.* at 6). He also attached a letter from Ms. Flynn to Ms. Bodeen expressing concern about the variation in the form of her signature notarizing petitions and requesting an explanation. (*Id.* at 7.) Ms. Bodeen responded by submitting an affidavit explaining the reasons for the variation in her signature and providing examples demonstrating the different versions of her signature.[9] (*Id.* at 8-10.) The Secretary of State found this explanation persuasive and validated the petitions notarized by Ms. Bodeen.

Subsequently, the Committee on State and Local Government proposed amending the Act to eliminate the requirement put forth by the Secretary of State that notarized documents must show the Notary Public's signature "exactly as indicated on the notary public's commission" and changed it to the present requirement that it must be "in the same form as indicated on the notary public's commission." (*Compare id.* at 4, *with id.* at 11.)

iii. Statutory Interpretation

Title 21-A of the Maine Revised Statutes, section 905(1) empowers the Secretary of State to review the petitions filed for a direct initiative. 21-A M.R.S. § 905(1) (2015). The section further requires the Secretary of State to review all petitions filed and to issue a written determination of the validity of the petitions within 30 days from the date of filing. *Id*. The Law Court has held that the Secretary of State "has plenary power to investigate and determine the validity of petitions." *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 12 n.8, 795 A.2d 75 (citing *Opinion of the Justices*, 116 Me. 557, 580-82, 103

[9] Ms. Bodeen asserted that her signature may have varied due to the amount she signed, the places in which she signed—such as on a couch, in a car, outside, and while sitting in bed—and the surface upon which she signed. (*Id.*)

A. 761, 771-72 (1917)). As defined by Ballentine's Law Dictionary, plenary power is "[p]ower as broad as equity and justice require." BALLENTINE'S LAW DICTIONARY, plenary power (3d ed. 2010). The Secretary of State is tasked with interpreting the Constitution and statutes as they pertain to the direct initiative and applying that interpretation to his review of each petition. The Court defers to the Secretary of State's interpretation of statutes unless "the statute plainly compels a different result." *Berube*, 668 A.2d at 877. When reviewing the constitutionality of a statute, the Court presumes the statute's compliance. "All reasonable doubts must be resolved in favor of the constitutionality of the statute." *Irish v. Gimbel*, 1997 ME 50, ¶ 6, 691 A.2d 664.

By that reasoning, "If the statute is susceptible of more than one reasonable interpretation, it is our duty to adopt an interpretation, if there is one, that is consistent with the constitution."*Rideout*, 2000 ME 198, ¶ 14, 761 A.2d 291 (*citing Irish v. Gimbel*, 1997 ME 50, ¶ 13, 691 A.2d 664). Furthermore, where the meaning of legislation regulating the absolute right of initiative is in question, the legislation must be interpreted in favor of the people's exercise of the right. *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983); *see also McGee*, 2006 ME 50, ¶ 18, 896 A.2d 933 (citing *Ferency v. Sec'y of State*, 409 Mich. 569, 297 N.W.2d 544, 550 (1980)).

In order to determine the constitutionality of the statute, the Court first determines whether the Legislature had the authority to enact the law in order to create procedures relating to the initiative process. *McGee*, 2006 ME 50, ¶ 19, 896 A.2d 933. If the Legislature had the appropriate authority, the Court determines whether, on its face, the statute is consistent with the Constitution. *Id*. If the statute is not facially consistent with

the Constitution, the Court reviews whether the statute otherwise "create(s) an abridgment of or undue burden upon the people's constitutional right of initiative." *Id*. Because the Legislature has the authority to enact legislation creating procedures to implement the initiative process, the Court now looks to whether section 951-A is consistent with the Constitution.

When enacted, section 951-A was a reaction to a situation similar to the one presented here. On the face of numerous petitions, the Secretary of State was unable to recognize Ms. Bodeen's notary signatures as those on her commission. In order to verify that the signatures did in fact belong to Ms. Bodeen, the Secretary of State sent her a letter asking for examples of her signatures and an explanation for its variation. The Secretary of State accepted Ms. Bodeen's explanation and found the petitions valid. Subsequently, the Secretary of State sought legislation to expedite this process and, as conceded by counsel for the Secretary, make it clear that the Secretary was not under any duty to investigate why signatures might exhibit variability. While the Legislature did not enact the requirement that the Notary Public's signature be "exactly as indicated on the notary public's commission," it is clear to the Court that the Legislative intent behind section 951-A was to allow the Secretary of State to make a determination of validity by conducting a facial comparison of signatures on petitions with signatures on file with the Secretary of State's Office.

The statute before the Court is subject to various interpretations. Based on Ms. Flynn's affidavit and language from the Determination, it is evident that the Secretary of State interpreted "in the same form" to require a "match" between the Notary Public's

signature on a petition and his or her signature on file in the Office of the Secretary of State. (*See* Flynn Aff. ¶ 16; R. Doc. 1, ¶ 2(A).) The "Petition Certification Instructions" provided by the Secretary of State to individuals reviewing the petitions for the Secretary of State, advised reviewers that "The law requires all notaries public to establish an official signature. That signature must be used for all notarizations. If you question the signature of the notary, compare it to the most recent signature on file. If the notary's signature on the petition does *not match* the signature on file with our office, all valid signatures on the petition will be invalidated for **OATSIG**." (R. Doc. 18, p.2) (emphasis added.) Alternatively, the Secretary of State claims to have applied an interpretation that reads "in the same form" as "generally consistent with the official signature on file." (Flynn Aff. ¶ 13(e).) Section 951-A could also be read to mean that in the absence of any evidence of fraud, it is presumed that a Notary's signature appears "in the same form" as indicated on the Notary's commission. [10] The Court discusses each of these interpretations below.

A. Interpreting "In the Same Form" to Require a Match

McGee v. Sec'y of State and *On Our Terms '97 Pac v. Sec'y of State of Me.* are instructive as to whether section 951-A's "in the same form" requirement can be read to

[10] Other jurisdictions have also interpreted their direct initiative process to incorporate a presumption that a circulator or notary's signature is valid evidence of constitutional compliance in the absence of evidence of fraud. *See United Labor Committee v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) ("To allow form to rule over substance is to permit the failure of the notary, whatever his reason, to defeat the initiative submission in spite of the fact that the proper number of voters have done all they can to comply with the initiative procedure"); *see also Hebert v. State Ballot Law Com*., 10 Mass. App. Ct. 275, 279, 406 N.E.2d 1047, 1049 (Mass. App. Ct. 1980) ("[I]n the absence of evidence of intentional fraud or guilty knowledge on the part of the circulator, it would be an unjust rule to deprive the honest signer of his right to have his signature counted, merely because some disqualified person signed, or because some person, without the knowledge of the circulator, affixed a fictitious name, or gave a fictitious address").

necessitate a "match" between the Notary Public's signature on a petition and his or her signature on file with the Secretary of State. In *McGee*, the Court found a statute that limited the period for circulation of petitions to one year was unconstitutional. 2006 ME 50, ¶ 41, 896 A.2d 933. *McGee* determined that the intent of the law was to make the statute more consistent with the Constitution by "reliev[ing] the Secretary of the responsibility of examining the dates of signatures on petitions to determine whether any of them are more than one year old" and by removing the opportunity for fraud in the dating of the signatures. *Id*. ¶ 30. The Court held that the flexibility of determining when to file a petition with the Secretary of State is not an unimportant right: "The process of collecting the number of signatures required to initiate a petition can be arduous. There may be fits and starts along the way. There may be unforeseen delays. Thus, allowing the circulators reasonable flexibility in completing the process is not only consistent with the constitutional right at issue, we conclude it is an integral component of the constitutional scheme." *Id.* ¶ 27.

In *On Our Terms '97 Pac*, the Federal Court for the District of Maine found the Secretary of State had not demonstrated that prohibiting direct initiative campaigns from paying circulators per signature was "narrowly tailored to meet a compelling state interest." 101 F. Supp. 2d 19, 26 (D. Me. 1999). The Court held that "[a] state's supposition that professional petition circulators are more likely to commit fraud than volunteers cannot carry its burden of proving that its regulation is narrowly tailored to meet a compelling need." *Id*. at 25 (*citing Meyer v. Grant*, 486 U.S. 414, 426 (1988); *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 475 (S.D. Miss. 1997)).

The court struck down the statute as violating the First Amendment of the United States Constitution.

Here, as in *McGee*, the Maine Constitution does not explicitly prohibit the addition of a statutory requirement that the Notary's signature on a petition match the Notary's commission. *McGee*, 2006 ME 50, ¶ 23, 896 A.2d 933. However, as the Law Court found similarly in *McGee*, the Constitution implies that in the exercise of the absolute right to initiative, the people will not be held to substantive requirements beyond those enumerated in the Constitution. *Id*. The petition circulation process is pure direct democracy. It involves standing in streets, shopping malls, public places and town halls, in both foul and fair weather, and asking for the voters' support. Notaries are often asked to administer an oath in the midst of these less than ideal circumstances.[11] The Court finds that requiring a Notary to perfectly reproduce his or her commission signature in light of these realities is unduly burdensome to this absolute constitutional right to initiative. Accordingly, the Court finds that to the extent section 951-A was interpreted and applied by the Secretary of State as requiring a Notary's signature on a petition "match" his or her signature on his commission, the Secretary of State's interpretation failed to comport with the right to initiative as set forth in the Maine Constitution. (*See* Flynn Aff. ¶ 16) ("During the review process, staff noticed significant variations in the signatures of five notaries that did not appear to match their official signatures on file.") Stated differently, the requirement that a Notary's signature "match" the Notary's

[11] Notary Public Bodeen described just such an experience in an affidavit sent to the Secretary of State explaining variance in her signature on petitions: "I have notarized petitions in many different places – outside; sitting in a car; sitting on a couch; and even sitting in a bed. The physical circumstances under which, and surfaces upon which I am signing, has an impact on the appearance of my signature." (Attachment A to Br. of Resp. 20.)

signature on his commission is vague, subjective, and unduly burdens this unique and fundamental right.

While the State of Maine has a compelling interest to ensure that all petitions submitted for consideration in a direct initiative are valid, requiring a Notary's signature to appear identically on every petition signed is unreasonable and abridges the Constitutional right to initiative. Similar to in *On Our Terms*, the supposition that a Notary is less likely to commit fraud if he is able to consistently reproduce the same signature does not meet the burden of proving that the application of the statute is "narrowly tailored to meet a compelling need." *Id.* It is not necessarily true that requiring a Notary's signature on a petition to perfectly match the signature on his or her Notary's commission ensures the Notary properly administered the circulator's oath as required by the Maine Constitution. By the same token, it is not necessarily true that a Notary's signature that significantly varies from that of the Notary's commission means that Notary did not properly administer the circulator's oath. The State has presented no evidence, and the Court is aware of none, correlating the variability of a Notary's signature with incidences of fraud in administering the circulator's oath. As such, an interpretation of "in the same form" that requires a Notary to flawlessly reproduce the signature on his commission burdens the right to initiative and does not make significant strides in preventing fraud. Although the "matching" requirement would relieve the Secretary of State from investigating signatures that are variant from the Notary's commission, the State's interest in expediting the Secretary of State's petition review process may not eclipse the absolute right of the people to directly legislate.

In sum, requiring a Notary's signature on a petition "match" his or her commission adds a substantive requirement to the direct initiative as set forth in the Maine Constitution. The Court is bound to interpret statutes in a manner that upholds their constitutionality and facilitates rather than hinders the right to initiative. *McGee*, 2006 ME 50, ¶ 55, 896 A.2d 933 (Clifford, J., concurring). An interpretation of section 951-A that requires matching signatures burdens the citizens to go beyond the requirements set out in the Maine Constitution and to actively persuade the Secretary of State that each Notary jurat was signed by the Notary whose name appears. There is no such burden of persuasion described in the Maine Constitution and this reading of 4 M.R.S. § 951-A does not harmonize with Article IV, Part 3, Section 18 of the Maine Constitution. Requiring Petitioners to predict how much variability will be permitted and to meet a burden of persuasion runs counter to the constitutional dictate that the right to initiative as established in the constitution is self-executing. The additional substantive requirement of a matching signature is unduly burdensome, insufficiently linked to a compelling State interest, and impermissibly abridges the right to initiative.

B. Interpreting "In the Same Form" as "Generally Consistent With"

As noted, the Secretary of State contends that the standard applied was not a requirement that the Notary's signature on the petition match, but that the signature be generally consistent with that of the Notary's commission. While this does not create the same burden that is created by requiring a match, the Court finds that this interpretation is unlawfully vague and begs for subjective and arbitrary application. A statute may be found unlawfully vague "when its language either forbids or requires the doing of an act

in terms so vague that people of common intelligence must guess at its meaning." *Portland v. Jacobsky*, 496 A.2d 646, 649 (Me. 1985).

Here, it is not clear what "in the same form" means in the context of a Notary's signature, and interpreting it to mean "generally consistent with" does not resolve this ambiguity. "Generally consistent with" could mean that the Notary must use the same name, always signing Joe Smith, rather than Joseph Smith, Jr. if the commission signature was Joe Smith. Alternatively, it could mean that the handwriting of the signature must be generally consistent with the commission signature and therefore the signatures must look consistent with one another. It could also mean that both the words and the handwriting must be generally consistent. Because a person with common intelligence must guess at the meaning of the statute when it is interpreted to require generally consistent signatures, and because there is no predictability in the application of an interpretation that requires general consistency, the Court finds that this interpretation does not harmonize with the constitutional right of the people to legislate. Me. Const., art IV, pt. 3, §§ 18, 20.

C. Interpreting "In the Same Form" to Harmonize with the Constitution

Despite the failings of the aforementioned interpretations, the Court nevertheless finds that section 951-A can be interpreted harmoniously with the Maine Constitution. This is because section 951-A can reasonably be read to mean that a Notary's signature is presumed to be "in the same form" as on that Notary's commission in the absence of evidence of fraud. In his concurrence in *McGee*, Justice Clifford cited to the *Opinion of the Justices* from 1924 that explained the difference between a directory standard, which

requires substantial compliance, and a mandatory standard, which requires strict compliance. 2006 ME 50, ¶ 56, 896 A.2d 933 (Clifford, J., concurring). The Opinion of the Justices distinguishes mandatory standards from directory standards according to whether the requirement is the "very essence of the thing to be done" or is "prescribed with a view to the orderly conduct of business." *Opinion of the Justices*, 124 Me. 453, 468-69, 126 A. 354, 363 (1924). Where the requirement is not the very essence of the thing to be done, substantial compliance is sufficient. *McGee*, 2006 ME 50, ¶ 56, 896 A.2d 933 (Clifford, J., concurring). In *McGee*, Justice Clifford explained that the mandatory standards were to be derived from the Maine Constitution and that the supporting statute should be understood to be directory in nature. *Id.*

Similarly, in the case before the Court, the very essence of the thing to be done is proper performance of the circulator's oath, as set out in the Maine Constitution. The purpose of section 951-A is to facilitate compliance with the constitutional requirement of a properly performed oath. Unlike the interpretation of section 951-A that requires signatures to match, an interpretation that does not read the word "must" to be mandatory, but that reads it as directory and presumes compliance, does not place an undue burden upon the right to initiative by creating a burden of persuasion. Unlike the interpretation that requires a Notary's signature on a petition to be "generally consistent with" the signature on that Notary's commission, a commonly intelligent person could understand what the statute requires if it was interpreted to presume the Notary signature on a petition is in the same form as that on the same Notary's commission in the absence of evidence of fraud. Section 951-A implements rather than burdens the constitutional

right to the direct initiative as long as "form" is interpreted in a flexible way to recognize the inevitability of variability in the face of tens, hundreds, or thousands of petitions for which the Notary must provide a jurat that he or she administered the oath.[12]

By the same token, a petition may be deemed invalid where the signature is entirely illegible and there is no other identifying information. Without any identifying information, the Secretary of State is not able to verify that the person signing as having administered the circulator's oath was in fact authorized to administer the oath. Therefore, under this circumstance, there can be no presumption that the oath was properly administered. This is because the constitutional requirement that the Secretary of State must uphold is the requirement that the circulator's oath be performed by a person authorized by law to administer oaths, not that the oath administrator's signature matches that of her Notary commission. Therefore, this interpretation of "in the same form" presumes that a signature is in the same form as that on the Notary's commission, unless the signature is so illegible as to be unidentifiable, or there is evidence of fraud.[13]

iv. The Secretary of State's Application of Section 951-A

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[12] In *Johnson v. Secretary of State*, filed prior to the enactment of section 951-A, the Secretary of State recognized the need to presume that the signing Notary on a petition performed her constitutional duty of administering the circulators oath. See *Johnson v. Secretary of State*, KENSC-AP-2009-56 (Me. Super. Ct., Ken. Cty., Dec. 23, 2009). In that case, the Secretary of State could not identify the signatures of Notary Public Bodeen on petitions as that on her commission. The Secretary of State contacted Ms. Bodeen seeking additional sample signatures and an explanation of the variance. By performing the investigation and accepting Ms. Bodeen's explanation, the Secretary of State acted on a presumption that the signing Notary fulfilled her constitutional obligation of administering the circulator's oath. Similarly, the Secretary of State continues to accept jurats signed by lawyers without comparison to an official signature. By accepting attorneys' signatures without verification, the Secretary of State is acting on a presumption that the lawyer did administer the circulator's oath.

[13] For example, an inordinate amount of petitions notarized on the same day by one Notary or circumstances similar to those in *Maine Taxpayers Action Network*, 2002 ME 64, 795 A.2d 75 could constitute evidence of fraud.

As discussed above, the Secretary of State impermissibly placed a burden upon Petitioners to persuade him that the each Notary's signature on a petition matched that on the Notary's commission, or was generally consistent with that signature. This new substantive burden led the Secretary of State to invalidate all of the petitions signed by a Notary whose signature varied, rather than to invalidate selectively each individual petition on which the signature varied from that on the Notary's commission. The Court's interpretation of section 951-A presumes that the Notary's signature is in the same form as that on the Notary's commission unless the signature is so variant as to be unidentifiable or there is evidence of fraud. Therefore, the Secretary of State's invalidation of all petitions for which the circulator's oath was administered by a Notary whose signature varied among the petitions was improper.

The Secretary of State is charged with reviewing "all petitions filed in the Department of the Secretary of State … for a direct initiative under the Constitution of Maine." 21-A M.R.S. § 905-A. The Court interprets "all petitions" to mean that each petition must be individually reviewed for validity. The obligation to interpret statutes in a manner that facilitates the people's sovereign power to legislate dictates that no petition should be considered invalid without some showing that the petition does not meet the constitutional requirements. *See Allen v. Quinn*, 459 A.2d at 1102-03.

Here, in order to fulfill this obligation, the Secretary of State must review each individual petition for the requirements enumerated by the Maine Constitution and any

evidence of fraud that would cause invalidation.[14] A determination by the Secretary of State invalidating all petitions signed by a particular Notary for signature variance detected on a number of petitions and therefore, the inability to determine whether the circulator's oath was performed, is arbitrary, capricious and inconsistent with the Constitutional right to the direct initiative.

The Secretary of State points to *Maine Taxpayers Action Network* for an instance when the Law Court permitted the blanket invalidation of all petitions collected by an individual circulator. 2002 ME 64, ¶ 21, 795 A.2d 75; *see also Cunningham v. Schaeflein*, 969 N.E. 2d 861, 874-76 (App. Ct. Ill. 2012) (pattern of fraud enough to invalidate all petitions circulated by one circulator). In *Maine Taxpayers Action Network*, the circulator was found to be an imposter who had used a stolen identity to register to vote in the State of Maine. 2002 ME 64, ¶ 4, 795 A.2d 75. Because the circulator in *Maine Taxpayers Action Network* was not who he said he was, the circulator's oath was inaccurate and none of the petitions containing names collected by him, and for which he took the circulator's oath, met the constitutional requirements for a valid petition. *Id*. ¶ 18. Unlike *Maine Taxpayers Action Network*, in this case the Secretary of State has not come forward with or alleged any evidence of fraud. The Secretary of State did not determine that the Notaries whose signatures varied from the signatures on their

[14] The Court is aware of the incredible amount of work performed by the Office of the Secretary of State since February of this year in order to review no less than five submissions of petitions including 449,805 signatures in order to determine validity as required by the Maine State Constitution. (Flynn Aff. ¶ 5). The Office of the Secretary of State has obviously been stretched thin. The Court is further aware of the legislative intent of Section 951-A to reduce the immense workload of the Office of the Secretary of State and does not mean to imply in any way that the Secretary of State had time to further investigate but chose not to. While there must be a solution to this unprecedented quantity of work, given the absolute nature of the right, the solution cannot abridge the right to initiative.

commissions did not properly administer the circulators' oaths. Instead, he claims he was unable to determine whether the Notary signatures belonged to those Notaries. As demonstrated in the present case, this interpretation of section 951-A poses a threat to the people's sovereign power to legislate. Accordingly, because the Secretary of State applied an incorrect and improper standard to invalidate the OATSIG signatures, his Determination is unsupported by record evidence.

IV. Conclusion

The Court reverses and remands the decision of the Secretary of State to take further action consistent with this Order.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: April 8, 2016

s/ J. Murphy
Michaela Murphy
Justice, Business & Consumer Court