STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
DOCKET NO. BCD-AP-16-04

ROGER BIRKS, et al.,	)	
	)	
Petitioners	)	RESPONDENT'S RULE 80C BRIEF
	)	AND MEMORANDUM IN
v.	)	OPPOSITION TO MOTION FOR COURT
	)	TO TAKE ADDITIONAL EVIDENCE
SECRETARY OF STATE	)	AND IN SUPPORT OF DISMISSAL
MATTHEW DUNLAP,	)	OF COUNT II
	)	
Respondent	)	

INTRODUCTION

Petitioners submitted over 20,000 petitions in support of an initiative to legalize marijuana on February 1, 2016, the last date that they could have filed to qualify for inclusion on the November 2016 ballot. The Respondent Secretary of State ("SOS" or "Secretary") was obligated by law to review the petitions within a 30-day-period. 21-A M.R.S. § 905(1). At the time of the review, SOS was also obligated to simultaneously review another 40,000 petitions for two other direct initiatives. Twenty-five percent of the marijuana petitions were circulated by 86 individuals who purportedly took an oath as to the validity of voters' signatures on those petitions before a single notary – Stavros Mendros.[1] Those consisted of 5,099 petition forms, purportedly notarized by him. The notary signatures on Mr. Mendros's petitions were so widely variable and unrecognizable as his official notary public signature that the SOS could not determine whether he had, in fact, administered the oath to 86 different circulators – an oath which is absolutely critical to ensuring the integrity of the initiative process. Accordingly, the SOS invalidated Mr. Mendros's petitions.

[1] Although Mr. Mendros was a paid organizer, he was not registered with the SOS as required by law. 21-A M.R.S. § 903-C.

Petitioners would have the SOS (and the Court) believe that Mr. Mendros himself used three different notary stamps, printed his name in at least three completely different styles of printing, and signed his name in a myriad of different ways. If that is true, then Mr. Mendros not only left the SOS unable to determine whether the petition circulators had properly taken their oath as to the voters' signatures appearing on the petitions before a person authorized to administer oaths, as required by the Constitution, but he also violated his legal obligations as a notary public, pursuant to 4 M.R.S. § 951-A, by failing to sign using his official signature.[2] The glaring inconsistencies suggest, however, that Mr. Mendros may not have signed and printed or stamped his name on all 5,099 petitions. Either way, the SOS could not determine the petitions to be valid in accordance with the Maine Constitution, article IV, part third, section 20 within the 30-day review period allowed by statute and by the Constitution.

Petitioners argue that the SOS overstepped his bounds in questioning the validity of the circulator's oath under these circumstances. Quite the opposite, the SOS was carrying out his constitutional responsibilities to assure the integrity of the initiative process. It is up to the petitioners to satisfy all constitutional and statutory requirements in gathering signatures on their petitions and getting them certified and filed on time. If they had done so in this case, then the initiative to legalize marijuana would have qualified for the ballot. Having failed to do so, the petitioners are entitled to continue circulating their petitions until next October, and to seek to qualify the measure for the ballot in 2017.

CONSTITUTIONAL AND STATUTORY REQUIREMENTS

Article IV, part third, sections 18 and 20 of the Maine Constitution set forth four essential requirements for a direct initiative petition:

[2] The notary's official signature is defined as "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.R.S. § 951-A(1).

1) Form of the petition: "The petition shall set forth the full text of the measure requested or proposed" by the citizens on "petition forms ... furnished or approved by the Secretary of State upon written application signed in the office of the Secretary of State by a resident of this State whose name must appear on the voting list of the city, town or plantation of that resident as qualified to vote for Governor." Me. Const. art. IV, pt. 3, §20.

2) Signatures of the voters: The petition must include the "original signatures" of individual petitioners who must sign "in the presence of the circulator" and whose names must "appear on the voting list of the city, town or plantation" where they reside as "qualified to vote for Governor." *Id.*

3) Oath of the circulator: The "authenticity of the signatures" on each petition must be verified by the oath of the circulator "that all of the signatures to the petition were made in the presence of the circulator and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be." *Id.* "The oath of the circulator must be sworn to in the presence of a person authorized by law to administer oaths." *Id.* Each circulator must be "a resident of this State" and his or her name "must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor." *Id.*

4) Certification by local registrar: Each petition "must be accompanied by the certificate of the official authorized by law to maintain the voting list of the city, town or plantation in which the petitioners reside that their names appear on the voting list of the city, town or plantation of the official as qualified to vote for Governor." *Id.*

A petition does not qualify as a "written petition" under Article IV, part 3, section 20 of the Constitution unless it includes the voters' original signatures, verified by the oath of the

circulator and accompanied by the registrar's certificate. *Id.; see also Opinion of the Justices*, 114 Me. 557, 567, 95 A. 869 (1915) ("a petition wanting either of these requirements" – the circulator's oath and the registrar's certificate – "is not a petition" within the meaning of the Constitution.) The oath of the circulator is critical to the integrity of this process, as is ensuring that the person authorized by law to administer that oath has done so properly.

The Legislature is authorized by Article IV, part 3, section 22 of the Maine Constitution to "enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions." "Such laws shall include provision for judicial review of any determination, to be completed within 100 days from the date of filing of a written petition in the office of the Secretary of State." Among those laws is 21-A M.R.S. § 905(1), which requires the SOS to "review all petitions filed ...for a direct initiative under the Constitution of Maine[;] ...[to]... determine the validity of the petition and issue a written decision stating the reasons for the decision within 30 days from the date of filing of a written petition in the Department of the Secretary of State."[3] Section 905 does not articulate what it means to "determine the validity of the petition," but that task necessarily includes determining that all the substantive requirements for a "written petition" set forth in the Constitution have been satisfied.

Several statutes enacted by the Legislature address the form of the petition and the formation of ballot questions for initiatives and referenda.[4] Others concern the substance of

[3] The review period is limited to 30 days by statute in order to comply with the Constitutional requirement that judicial review be completed within 100 days of the Secretary's determination.

[4] *See, e.g.*, 21-A M.R.S. § 901 (applications for approval to circulate and review of proposed legislation by Revisor of Statutes); § 903 (instructions printed on petitions); § 903-C (registration of organizations paid to circulate, manage or supervise petition drives); § 904 (certain acts defined as class E crimes); § 905 (time frames for Secretary to determine validity, and procedure for judicial review of his decision); § 906 (form and wording of ballot questions).

petitions, such as the method by which petitions must be "signed, verified and certified." [5] The requirement that the circulator's oath "must be sworn to in the presence of a person authorized by law to administer oaths" is implemented by the statutes governing notaries and attorneys who are authorized to administer oaths. *See* 4 M.R.S. §§ 951 et seq. and § 1056.

The specific notary statute at issue in this appeal is Title 4, section 951-A, which was enacted in 2009, specifically in response to difficulties encountered with notary signatures on initiative petitions. Here is the full text:

> **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.
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> **2. Change of signature.** If the official signature of a notary public changes during the term of the notary public's commission, the notary public shall immediately provide the Secretary of State with a new sample of the notary public's official signature.

FACTUAL BACKGROUND

Six registered voters obtained approval to circulate a petition for a citizen initiated bill entitled "An Act to Legalize Marijuana" on April 28, 2015. R. 22. At that time, the SOS gave instructions to petitioners, both orally and in writing, on how to satisfy all of the statutory and constitutional requirements. R. 21.

Petitioners had approval to circulate until October 28, 2016, but in order to get their proposed ballot measure before the voters at the November 2016 general election, they had to

[5] 21-A M.R.S. § 902 on verification and certification of petitions cross references the requirements for non-party candidate nominating petitions in 21-A M.R.S. § 354. *Id.* § 354(3)(voter "must personally sign his name in such a manner as to satisfy the registrar of his municipality that he is a registered voter" and "[e]ither the voter or the circulator of the petition must print the voter's name"); § 354(4)("voter or the circulator of the petition must write or print the voter's residence address and municipality of registration" and "[d]itto marks are permitted for residence address and municipality of registration only"); § 354(7)(A) (requirements for circulator's oath); and § 354(7)(C) (requires registrar to certify names on petitions as being those of registered voters in that municipality and prohibits registrar from certifying names "that do not satisfy subsection 3").

file completed petitions with the SOS by February 1, 2016.[6] On February 1st, they delivered 20,671 petitions to the SOS, containing a total of 99,229 signatures. R. 19, 20. That same day, two other groups of petitioners delivered a total of 48,499 petitions to the SOS for review – one for an initiative to Advance K-12 Public Education and the other relating to a proposed York County Casino. *See* Affidavit of Julie Flynn ("Flynn Aff.") ¶ 5. The SOS was already in the process of reviewing two petition filings that had been submitted in mid-January. *Id.* In each case, the SOS had only 30 days to determine the validity of each of these petitions. 21-A M.R.S. § 905(1). During a six-week period, therefore, from January 14 until March 2, 2016, the SOS had to determine the validity of over 100,000 petitions containing nearly 450,000 signatures. Flynn Aff. ¶5.

The SOS review is a multi-step process that entails organizing all of the petitions by town; numbering each one; verifying that each petition is in the approved form; checking the registered voter and residency status of each circulator (there were 549 circulators in this petition drive); verifying that the local registrar received the petitions by the constitutional deadline of January 22, 2016, and correctly tallied the number of names on each petition certified as those of registered voters; reviewing the dates of the voters' signatures to be sure they signed before the circulator took the oath; checking to see that the circulator took the oath before the petitions were submitted to the local registrar; and verifying that the name of each person shown as administering the circulator's oath (there were 127 individuals administering the oath in this petition drive) is a commissioned notary public or licensed attorney. Flynn Aff. ¶¶ 13, 15. The SOS staff also observe the notary's signature to see if it is recognizable as that of the

[6] The deadline set forth in the Constitution is the 25th day after the convening of the Legislature in Second Session, which fell on February 1, 2016. *See* Me. Const., art. IV, pt. 3, § 20. To meet that deadline, the Constitution also required petitioners to submit the petitions to local registrars for certification on or before January 22, 2016.

commissioned notary – i.e., if it is consistent with the official signature on file for that particular notary, as required by law. 21-A M.R.S. § 951-A. Flynn Aff. ¶ 13(e).[7]

The results of the SOS review are recorded on each petition, and then entered into a database from which reports are generated, listing each petition by number, by circulator, and by notary, and showing the number of valid and invalid signatures on each. Flynn Aff. ¶ 14. *See* reports at R. 2-7. The database allows listing of up to three reasons for invalidating signatures.

While reviewing the marijuana petitions, SOS staff observed significant variations in the signatures of five notaries – Stavros Mendros, Elliot Chicoine, James J. Tracey, Jr., Jacob Darveau and Wendy Tinto. Flynn Aff. ¶ 16. Staff had begun noticing the variations in notary signatures in reviewing the Background Check and York County Casino petitions just prior to review of the marijuana petitions, and that observation prompted staff to pay closer attention to the notary signatures on the marijuana petitions. *Id.* For most notaries on the marijuana petition drive, the SOS found only minor variations in their signatures on petitions when compared to the official signatures on their notary public commissions. For the five notaries at issue here, though, the signatures on the petitions did not appear consistent with the official signatures on the notary public commission documents for these notaries. *Id.* and R. 13-17. (*See* examples from the Agency Record, R. 8, attached hereto as Attachments B and C.) In many instances, the printing of the notary's name (if no inked stamp was used) also was inconsistent with the printing on the notary commission documents. Flynn Aff. ¶ 16. Based on these findings, the Secretary of State made the determination on the last day of the review process to invalidate the

[7] The SOS usually checks for duplicate voter signatures on petitions, but this is a process that involves entering all of the voter names into a database; generating and reviewing print-outs in alphabetical order to identify potential duplicates; and reviewing each petition and line number where those names appear to determine if they are signatures of the same voter or of two voters with similar names. Flynn Aff. ¶ 11. Because the SOS was under a statutory deadline to review over 60,000 petitions in only 30 days, staff determined that it was not feasible to check for duplicates. *Id.*

signatures on the petitions listing these five notaries. Those signatures were coded as invalid for "OATSIG." R. 1, ¶2A.

As stated in paragraph 2A of the determination, the Secretary invalidated 31,338 signatures for "OATSIG" on petitions purportedly notarized by Stavros Mendros, Elliot Chicoine, James J. Tracey, Jr., Jacob Darveau and Wendy Tinto. Of that total, 9,541 signatures were also found invalid for other reasons. Spreadsheets contained in the agency record list the reasons unrelated to notarization for which the SOS invalidated signatures on these petitions. *See* R. 7.[8] Stavros Mendros's name appears as the notary on a total of 5,099 petitions. Of the 26,779 voter signatures listed on those petitions, 7,567 were found invalid for other reasons, and the remaining 19,212 signatures were invalidated solely because the SOS could not determine whether Mendros had, in fact, signed those petitions and administered the oath to the 86 circulators of those petitions. Thus, petitioners are correct in asserting that they would have had enough valid signatures to qualify the marijuana initiative for the ballot had these 5,099 petitions been properly notarized.

The Secretary of State issued his final Determination of Validity on March 2, 2016, listing separately each reason for invalidation, and the number of signatures invalidated for each one of those reasons. R. 1. Petitioners filed this Rule 80C appeal on March 10, 2016. By statute, the Court is required to issue a decision within forty (40) days of the Secretary's determination, which in this case means by April 11, 2016. 21-A M.R.S. § 905(2).

STANDARD OF REVIEW

In this Rule 80C proceeding, the Secretary's determination of validity may be reviewed only for abuse of discretion, errors of law, or findings not supported by evidence in the record.

[8] Petitioners claim to have been unable to ascertain these numbers from the Agency Record (*see* footnote 3 to Petitioners' Rule 80C brief), but the data is contained in spreadsheets for the petitions associated with each of the five notaries. These are in the record at R.7.

Palesky v. Secretary of State, 1998 ME 103, ¶9, 711 A.2d 129. "The court shall not substitute its judgment for that of the agency on questions of fact." 5 M.R.S. § 11007(3). Thus, the Secretary's factual findings must be affirmed "if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Concerned Citizens to Save Roxbury v. Board of Environmental Protection*, 2011 ME 39, ¶ 24, 15 A.3d 1263. "An agency's findings of fact will be vacated only if there is no competent evidence in the record to support a decision." *Id.* (internal quotations omitted). An agency's interpretation of a statute that it is charged with administering is entitled to great deference and will be overturned only if the statute compels a contrary result. *Dyer v. Superintendent of Insurance*, 2013 ME 61, ¶11, 69 A.3d 416.

ARGUMENT

Contrary to Petitioners' arguments, the Secretary has broad authority to determine the validity of petitions, and to require that notaries comply with the notary laws in administering the circulator's oath, which is so critical to ensuring the integrity of the initiative process. The Secretary acted well within the bounds of his authority in this instance. His interpretation of the notary statute, which his office is charged with administering (and even proposed to the Legislature), is reasonable and entitled to deference.

The Secretary's determination that this petition fell short of the minimum number of valid signatures to qualify for the November 2016 ballot is legally correct, is supported by substantial evidence in the agency record and should be affirmed. If the Court instead decides to allow petitioners to submit the testimony of notaries or circulators as additional evidence in an effort to demonstrate that all 86 circulators did take the oath before Mr. Mendros, those witnesses should be subject to cross examination – either before the Court, or before the

Secretary on remand, pursuant to 5 M.R.S. § 11006(1)(B). Finally, Count II of petitioners' pleading should be dismissed as duplicative of Count I, or denied on the merits.

I. The Secretary of State's determination of invalidity is correct as a matter of law.

A. The Secretary has broad authority to determine the validity of initiative petitions, including determining whether the circulators' oath was properly administered by a person authorized to administer oaths.

The Secretary of State is "vested" by statute, 21-A M.R.S. § 905(1), "with the authority to determine the validity of any petition in support of a citizens initiative." *Maine Taxpayers Action Network v. Secretary of State,* ("MTAN"), 2002 ME 64, ¶12. Indeed, as the executive officer charged with overseeing the petition process, the Secretary of State "has *plenary power* to investigate and determine the validity of petitions." *Id. at* ¶12 n. 8, 795 A.2d 75 (emphasis added), citing *Opinion of the Justices*, 116 Me. 557, 580-82, 103 A. 761, 771-72 (1917). Thus the Secretary "may disqualify signatures for a failure to follow the requirements of the Constitution or its statutory overlay." 2002 ME 64, at ¶12.[9]

In prior cases, for example, the Law Court has upheld the Secretary's decision to invalidate signatures obtained by circulators who were not Maine residents, *Hart v. Secretary of State*, 1998 ME 189, ¶ 13, 715 A.2d 165, as well as signatures not contained on approved petition forms or lacking a properly executed certification by the local registrar. *Palesky v. Secretary of State*, 1998 ME 103, ¶¶ 11-13, 711 A.2d 129. In those circumstances, the Secretary did not follow a particular statutory directive; instead, he exercised his plenary authority to interpret and apply the petition requirements in the Constitution. While the Secretary cannot act contrary to an explicit statutory directive, his authority to determine the validity of petitions is not dependent upon the existence of a specific statute.

[9] By contrast, the Secretary's authority to determine the validity of a candidate petition is not as broad, and in that area he is constrained to adhere to the express directives of the statute. *See Knutson v. Secretary of State,* 2008 ME 124, ¶ 20, n.7, 954 A.2d 1054.

The Law Court recognized in *MTAN* that "the circulator's oath is critical to the validation of a petition" because the Secretary "has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition." 2002 ME 64, ¶ 13, 795 A.2d 75. The integrity of the initiative process "in many ways hinges on the trustworthiness and veracity of the circulator" who must attest, under oath, that all of the individuals who signed each petition did so in the circulator's presence, and that "to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be." *Id.;* Me. Const., art. IV, pt. 3, §20. The failure of a circulator to sign his or her oath in the presence of a notary public "is therefore an error of constitutional import" which is "fatal to an entire petition." *MTAN*, 2002 ME 64, ¶13, 795 A.2d 75, 80, citing *Palesky*, 1998 ME 103, ¶¶ 10-11, 711 A.2d at 129. And "the Secretary has the authority to invalidate petitions *in toto* when the circulator has not complied with statutory or constitutional requirements." *MTAN*, 2002 ME 64, ¶ 12.

The notary's role is equally crucial, because it is the notary public who administers the oath to the circulator. Moreover, the notary's signature is not the signature of a "witness" to the circulator's oath, as petitioners suggest (*see* Pet. Br. at 10) – it constitutes the jurat designed to prove that the oath was administered. *See Opinion of the Justices*, 114 Me. at 574, 95 A. 869 (1915) (the circulator "may make oath before a magistrate as to the authenticity of the signatures, and the magistrate's jurat or certificate thereof is sufficient evidence of the facts stated in it").[10]

In focusing on the notaries' actions with regard to the marijuana petitions, the Secretary was applying a constitutional requirement that is essential to the integrity of the initiative process. Just as the Secretary "has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition" and therefore must rely on the circulator's

[10] In the same opinion, the Justices answered that if the jurat were filled out on the first sheet of the petitions but not on the remaining sheets attached thereto, only the first sheet could be counted. 114 Me. at 568, 95 A. 869.

oath to verify that; so, too, the SOS has no practical way within 30 days to verify that each of the 549 circulators involved in this petition drive actually made the statements about those voters' signatures under oath. He has to rely on the "person authorized by law to administer oaths" – in most cases, a notary public – to assure that this has occurred. If the SOS has no confidence that a notary public administered the oath, then he can have no confidence in the integrity of the petition.

Enactment of Title 4, section 951-A, requiring a notary to use his or her official signature when performing notarial acts, aids implementation of the oath requirement by helping to make it possible for the SOS to determine the validity of petitions on the face of the petitions – i.e., without the necessity of undertaking an independent investigation. As noted above, the initiative provisions of the Maine Constitution grant the Legislature the authority to carry out the constitutional mandates through legislation, as long as those statutes are not "inconsistent" with the Constitution. *MTAN*, 2002 ME 64, ¶ 10; Me. Const., art. IV, pt. 3, § 22. Because it is a tool for enforcing the oath requirement, the notary statute is not inconsistent with the initiative and referendum provisions of the Constitution.[11]

Indeed, the SOS proposed enactment of 4 M.R.S. § 951-A, in direct response to a prior initiative case in which the SOS had encountered widely varying signatures by a notary. *See* Testimony on L.D. 379, of Timothy Poulin of the Department of the Secretary of State, along with attachments, in the official file of the Joint Committee on State and Local Government, appended to this Brief as Attachment A. The SOS had been unable to determine in those prior petition cases whether the notary had, in fact, administered the oath to the circulators of the

[11] A contrasting example is the one-year deadline that was formerly in 21-A M.R.S. § 903-A, but was struck down by the Law Court in *McGee v. Secretary of State*, 2006 ME 50, ¶ 38 as being inconsistent with the Constitution.

petitions she purportedly signed. Att. A at 3. At the time, the statute allowed the SOS a longer period in which to review petitions,[12] and the SOS was able to both interview the notary and obtain a fairly detailed statement under oath describing the circumstances under which she notarized the petitions. *See* Affidavit of Cynthia Bodeen with sample signatures, provided with Poulin testimony, Att. A at 8-10. Without this additional evidence, the SOS would have rejected Bodeen's petitions. *See* Att. A at 7.

The Secretary's proposed amendment to the notary laws was enacted in the spring of 2009, but did not become effective until September 12, 2009 – the day *after* the SOS received the people's veto petition challenged in the *Johnson* case, relied upon by Petitioners here. P.L. 2009, ch. 74 (eff. Sept. 12, 1999).[13] Because the new statute was not yet in effect, the SOS could not and did not apply it during review of the people's veto petitions. Petitioners are incorrect in asserting that the Superior Court ruled in *Johnson* that 4 M.R.S. § 951-A could not lawfully be applied to review of petitions. *See* Pet. Br. at 10-11.[14]

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[12] In 2009, the SOS was required to "determine the validity of the petition and issue a written decision within 30 days *after the final date for filing* the petitions in the Department of the Secretary of State under the Constitution of Maine, Article IV, Part Third, Section 17 or 18" – not within 30 days from the date the petition is actually filed with the SOS, as the statute currently provides. This amendment was enacted following the Superior Court's decision in *Webster v. Dunlap*, KENSC-AP-09-55 (Me. Super. Ct., Kenn. Cty., Dec. 21, 2009) (Marden, J.) – a companion case to *Johnson v. Secretary of State*, cited by petitioners and attached to their Rule 80C Brief. *See* P.L. 2009, ch. 611, § 5 (eff. July 12, 2010),

[13] As noted by the Court in *Johnson*, the people's veto petition was filed with the SOS on September 11, 2009. *See* p. 1 of Petitioner's Ex. 4.

[14] The *Johnson* case involved two separate issues relating to Cynthia Bodeen's notarizations: 1) that she used the name Bodeen, which was on her notary commission, instead of her new legal married name of Mendros, and 2) that her signature as notary was illegible on petitions containing 1,597 names. The SOS had accepted her petitions despite these defects based on specific knowledge gained from the affidavit included in the Legislative record. *See* Att. A at 8-9. The *Johnson* Court upheld the SOS decision based on that evidence in the record. Stavros Mendros is well aware of the history of Title 4, section 951-A, since, as the court noted in *Johnson*, Cynthia Bodeen is his wife. 2009 WL 6631827, n.2.

B. The Court must give deference to the Secretary's interpretation of the notary statute, which he is charged with administering.

As the state official who is statutorily responsible for commissioning and disciplining notaries, pursuant to 5 M.R.S. § 82, the Secretary is entitled to deference in his interpretation of the laws governing notaries. *See Dyer v. Superintendent of Insurance*, 2013 ME 61, ¶11, 69 A.3d 416 (agency's interpretation of a statute that it is charged with administering is entitled to great deference and will be overturned only if statute compels a contrary result).

Petitioners argue, in part, that the phrase "in the same form as indicated on the notary public's commission" in 4 M.R.S. § 951-A(1) must be read to mean using the same first and last name and initials. *See* Pet. Br. at 13. This cramped interpretation is not compelled by the language of section 951-A, however, nor is it consistent with common sense as applied by the SOS. The term "form" also encompasses the shape and configuration of the signature, not just the letters of the name – otherwise, the statute would only need to refer to using the same name. Petitioners also suggest that "although there is variability in Mr. Mendros's signature, the notary public statute does not prohibit variability." Pet. Br. at 13-14. Respondent agrees that some variability is permissible, since very few people (even notaries who are under a legal obligation to sign consistently) sign their name in the exact same manner each and every time. For that reason, in this case the SOS did not reject the petitions on which these five notaries' names appear because their signatures did not *exactly match* the signature or signatures on file with the SOS. Instead, the SOS staff looked to see if each notary's signature was generally consistent with the notary's official signature on file – i.e., recognizable as being in the same form. Flynn Aff. ¶¶ 13(e) and 16.

C. The Secretary's determination to invalidate petitions based on defects in the notarization of the circulators' oath does not violate petitioners' constitutional rights.

Article IV, part third, section 18 of the Maine Constitution "reserves to the people the right to legislate by direct initiative" – but "*only if the constitutional conditions are satisfied.*" *McGee v. Sec'y of State*, 2006 ME 50, ¶ 25, 869 A.2d 933 (emphasis added). Verification of the signatures by oath of the circulator, properly administered by an official authorized to administer oaths, is an "indispensable accompaniment[] of a valid petition." MTAN, 2002 ME 64, ¶ 14, quoting *Opinion of the Justices*, 116 Me. 557, 569, 103 A. 761 (1917). It follows that rejecting a petition for failure to meet the oath and notarization requirements does not violate the initiative and referendum provisions of Maine's Constitution. Nor does it violate petitioners' First Amendment rights to engage in core political speech, as Petitioners contend. Pet. Br. at 18.

Requiring petitioners to use notaries who will follow the law in carrying out their responsibilities is a reasonable regulation that is not unduly burdensome and does not "severely burden" "core political speech."[15] Indeed, the fact that most notaries – approximately 120 out of 127 involved in this petition drive[16] – apparently had no difficulty signing the circulator's oath in a manner consistent with their official signatures on file shows that it is not difficult to do. *See* Flynn Aff. ¶ 16 (noting that staff found only minor variations in most notary signatures – not enough for them to question whether the named notary had in fact administered the oath).

It is widely recognized by courts that states have a compelling interest in ensuring the integrity of the initiative process and in preventing fraud. *See Buckley v. American Law*

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[15] *Contrast American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092, 1099, 1103-1104 (10th Cir. 1997), where the court found that requiring a circulator to wear a name badge when circulating imposed a severe burden by interfering with direct communication between the circulator and a voter, whereas requiring the circulator to file an affidavit with the Secretary of State did not.

[16] Two attorneys also administered the oath to circulators of the marijuana petitions. *See* R. 9 at p. 3.

Foundation, Inc., 525 U.S. 182, 191 (1999); *Hart*, 1998 ME 189 at ¶¶ 9 & 13; *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); and *Kean v. Clark*, 56 F.Supp.2d 719, 733 (S.D. Miss. 1999). As noted above, circulators perform an essential function in advancing and protecting the integrity of the citizen-initiative process. While local registrars can and do check the names on the petitions to verify that those names belong to persons registered to vote in their district, there is no realistic means for a registrar to verify that each of these individuals actually signed his or her name to the petition. That is the task assigned to the circulator, and for the process to have any integrity, the oath of that circulator has to be one that the State and its citizens can rely upon. *See American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092, 1099 (10th Cir. 1997), *aff'd, Buckley*, 525 U.S. 182 (1999) ("circulators are entrusted with personal responsibility to prevent irregularities in the petition process").

A statute requiring the notary is to administer the circulator's oath properly and to signify that he or she has done so by signing below the circulator's name on the petition using the notary's official signature is a regulation narrowly tailored to carry out the state's reasonable interest in insuring the integrity of the initiative process. *See MTAN*, 2002 ME 64, ¶20.

II. The Secretary's factual findings are supported by substantial evidence in the record and should be affirmed.

Petitioners' suggestion that Mr. Mendros's signatures on these petitions are only somewhat "variable" is an absurd understatement. Even the small sampling of Mendros's signatures on petitions attached here as Attachment B reveals a wide range of signature styles that are not even recognizable as being that of the same person – let alone consistent with his official notary signature. *See* R. 13. The use of three different notary stamps and several different styles of printing in lieu of any stamp on some petitions also raised questions regarding whether Mr. Mendros in fact administered the oaths to these circulators. A sampling of petitions

purportedly signed by the other four notaries reveals a similarly wide range of signatures that are not "in the same form" as those notaries' official signatures. *See* Attachment C and R. 14-17.

The purpose of the notary statute (4 M.R.S. § 951-A) is to avoid the necessity of going beyond the face of the document that was purportedly notarized in order to determine if that commissioned notary actually performed the notarial act that the notary's signature is intended to confirm. This is particularly important in petition cases, when the SOS is faced with tens of thousands of petitions to review within an extremely short period of time. It is simply unworkable for the SOS to reach out and interview, and then take testimony under oath, of dozens or hundreds of circulators in order to ascertain whether they properly attested to the signatures on the petitions they circulated. In this case, the time pressures on the SOS were unusually intense because of multiple filings on the same day, and the problems identified with the notaries' signatures were not fully assessed until the last day of the statutory review period. *See* Flynn Aff. ¶ 16.

The Secretary's factual findings with regard to these five notaries' signatures are supported by substantial evidence in the record, and should be affirmed.[17] As in any Rule 80C proceeding for judicial review of state agency action, the Court is precluded from substituting its judgment for that of the agency on questions of fact. 5 M.R.S. § 11007(3).

[17] Petitioners claim that the fact that the SOS approved some 400 petitions notarized by Stavros Mendros in the fall of 2015 for the Ranked Choice Voting ("RCV") initiative demonstrates that the SOS decision in this case was arbitrary, and they seek to leave to introduce evidence of the RCV petitions into this record. Even if the RCV petitions notarized by Mendros revealed use of multiple notary stamps and innumerable variations in his purported signature, acceptance of those petitions would not support a finding that the SOS erred in this case. The RCV petitions are irrelevant to this proceeding.

III. If the Court determines that Petitioners have met the criteria for presenting additional evidence, the Petitioners' witnesses should be subject to cross-examination and the SOS should have the opportunity to present additional witnesses corroborating the untrustworthiness of certain purported notary signatures.

Petitioners have failed to make a showing that they are entitled to an order from this Court for the taking of additional evidence, either before this Court or on remand before the SOS. Pursuant to 5 M.R.S. § 11006(1)(B), a reviewing court may approve a request for the taking of additional evidence if "it is shown that the additional evidence is material to the issues presented in the review, and could not have been presented or was erroneously disallowed in proceedings before the agency."

In this case, petitioners were on notice that 1) the circulator must personally appear before the notary, take the oath and sign the circulator's oath in the notary's presence; 2) the notary public must fill in the date the circulator appeared before the notary and took the oath; and 3) the notary must sign the circulator's oath and that signature "must match the name and signature that is on file with the Secretary of State." R. 21. Indeed, Mr. Mendros was personally familiar with the requirement, since it was the issue with his wife's signature that led to the enactment of 4 M.R.S. § 951-A (requiring the notary to sign as he did in his most recent application for notary public commission). *See Johnson v. Dunlap*, 2009 WL 6631827, n. 2 (Me. Super. Dec. 23, 2009) (Exhibit 4 to Petitioners' 80C Brief); Legislative History for L.D. 379 (Attachment A). The wide variance in signatures is apparent on the face of the petitions, and to the extent that extraneous information would have permitted the SOS to authenticate the notary signatures, that information, in the form of affidavits or otherwise, should have been produced prior to the February 1, 2016, filing deadline.

In order to support their request for an opportunity to take additional evidence, petitioners have submitted conclusory fill-in-the-blank affidavits from selected circulators and notaries. *See* Petitioners' Exhibits 1 and 2. The veracity of the statements made by these affiants should be subjected to the "crucible of cross-examination." *See, e.g., State v. Barnes*, 2004 ME 105, ¶ 8, 854 A.2d 208. One affidavit contradicts statements the circulator, Jennifer Nadeau, made to an Attorney General Detective only days before she signed the affidavit. *See* MacMaster Affidavit at ¶ 6. Another affidavit contains information that is demonstrably false. *See id.* at ¶¶ 10-11. Specifically, Stavros Mendros stated under oath that he "affixed my notary stamp to each such petition" and that "every petition...that bears my notary stamp also bears my original signature." Mendros Affidavit at ¶ 6. Since numerous petitions that purport to bear Mr. Mendros's signature do not bear his notary stamp (MacMaster Affidavit at ¶ 11), either Mr. Mendros is conceding that the petitions without his stamp do not in fact contain his signature or he is falsely affirming under oath that he used a notary stamp on all the petitions that he notarized. There is also the question of how Mr. Mendros could have possibly administered oaths on the nearly 5,100 petitions on which his purported signature appears.

In addition, Mr. Mendros's handling of petitions from a simultaneous petition drive, the referendum in support of the York County Casino, raises significant questions about the credibility and integrity of his oath. Specifically, Mr. Mendros's purported signature as notary appears on petitions that had been previously returned to the petition organizers from municipal clerks in Portland and Old Orchard Beach because the circulator's oath had not been completed. *See* Affidavits of Heidi Peckham and Ann Boucher. The evidence shows that the circulators signed the petitions but that their signatures were not in fact notarized prior to submission to the municipal clerks. It was only after the municipal clerks returned the petitions to the petition

organizers that the notary signature was inserted by someone and back-dated to a date prior to submission to the clerk. If it was the notary who signed the back-dated oath, such conduct may constitute a crime under 21-A M.R.S. § 904(2) (False Acknowledgement of Oath).

If this Court determines that petitioners have met the criteria for taking additional evidence, this Court could remand to the SOS or, in the interest of time, convene a testimonial hearing in this Court.

IV. Count II is duplicative of Count I and should be dismissed.

Petitioners allege in Count II that 21-A M.R.S., Chapter 11 unconstitutionally restricts their rights of free speech and expression under both the Maine and United States Constitution as applied to the facts presented here. Petitioners do not cite to any authority for Count II. A claim made directly under the United States or Maine Constitution does not lie. A litigant complaining of a constitutional violation must utilize 42 U.S.C. § 1983. *Sacred Feather v. Merrill,* 2008 WL 2510100 (D. Me. 2008) (section 1983 is the "fulcrum" that allows plaintiffs to bring their constitutional claims to this court); *Azul-Pacifco, Inc. v. City of Los Angeles,* 973 F. 2d 704 (9th Cir. 1992). *Thomas v. Shipka,* 818 F. 2d 496, 499 (6th Cir. 1987) (plaintiff has no cause of action directly under the United States Constitution, and must use 42 U.S.C. §1983). Similarly, the Maine Constitution does not support a private cause of action. *Andrews v. Department of Environmental Protection,* 1998 ME 198, ¶¶ 21-23, 716 A.2d 212. Count II can be dismissed on the basis that petitioners cannot bring a constitutional claim directly under either the Maine or United States Constitution and have cited no authority for either claim.

Even if it were assumed that the authority for Count II is 42 U.S.C. § 1983, the § 1983 remedy should be dismissed as duplicative since the constitutional claim can be adequately

resolved under the procedures available under state law.[18] *Antler's Inn & Restaurant, LLC v. Department of Public Safety,* 2012 ME 143, ¶¶14-15, 60 A.3d 1248; *Kane v. Commissioner of the Department of Health and Human Services,* 2008 ME 185, ¶¶30-32, 960 A. 2d 1196. The Court can address petitioners' constitutional claims under Count I, which is brought pursuant to the Maine Administrative Procedure Act ("APA) and M.R. Civ. P. 80C. Pursuant to Count I, the Court is empowered to resolve the matter by affirming, remanding, reversing or modifying the Secretary of State's decision if the "findings, inferences, conclusions or decisions" are:

> (1) in violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by bias or error of law;
> (5) Unsupported by substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S. §11007(4). All of the relief sought under Count II is available under 5 M.R.S. §11007(4).

Petitioners attempt to distinguish *Antler's Inn* and *Kane* on the basis that Count II seeks different relief and is based upon different facts. Pet. Br. at 17-18. The purported distinction is inaccurate. Both Counts I and II seek to overturn the SOS decision and seek a Court Order that would require submission of the initiative to the voters. Both Counts I and Counts II relate to the decision of the SOS that the direct petition was invalid for failure to submit a sufficient number of valid signatures. Petitioners' choice to parse their claims into different counts does not change the analysis. Since state law provides an adequate remedy under the APA and M.R. Civ. P. 80C, Count II should be dismissed as duplicative.

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[18] The Legislature created a State private cause of action for violation of a person's rights under the Maine Constitution in the Maine Civil Rights Act, 5 M.R.S. §§ 4681-4685 ("MCRA"). The MCRA requires physical force or violence, damage or destruction of property, trespass on property, or threats thereof. *Id.* There are no such allegations here. Accordingly, there is no possible MCRA claim in this case.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests the Court to affirm his decision on the agency record, deny petitioners' motion to take additional evidence, and dismiss Count II of the Rule 80C petition.

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Respectfully submitted,

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