STATE OF MAINE KENNEBEC, ss		SUPERIOR COURT CIVIL ACTION Docket No. CV-20-95
ALLIANCE FOR RETIRED AMERICANS; DOUG BORN; DON BERRY; and VOTE.ORG, Plaintiffs, v. MATTHEW DUNLAP, in his official capacity as the Maine Secretary of State; and AARON FREY, in his official capacity as the Maine Attorney General, Defendants.	)	BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION AND MAINE CONSERVATION VOTERS AS AMICI CURIAE

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION AND MAINE CONSERVATION VOTERS AS AMICI CURIAE

The American Civil Liberties Union of Maine Foundation and Maine Conservation Voters (collectively, "amici") submit this amici curiae brief in support of the plaintiffs, with the consent/nonobjection of the parties,[1] to assist the Court in resolving the issues in this case.

The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure that rights guaranteed and secured by the Maine and United States Constitutions,

[1] Counsel for plaintiffs and for intervenor-defendants indicated, by email dated August 21, 2020, that they consent to the filing of this amici curiae brief; counsel for defendants indicated, by email dated August 21, 2020, that they do not object to the filing.

including the right to vote, are protected.

Maine Conservation Voters ("MCV") protects Maine's environment and our democracy by influencing public policy, holding politicians accountable, and winning elections.

I. INTRODUCTION.

There is broad agreement across the political spectrum that the November 2020 general election is one of the most consequential in our recent national history.[2] Unfortunately, this most consequential election will take place amidst a massive cost-cutting overhaul at the United States Postal Service ("USPS") (which includes cutting overtime, prohibiting extra drop-off trips to ensure on-time mail delivery, and removing mail-sorting machines),[3] as well as a deadly global

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[2] *See* Joseph R. Biden, Jr. (@JoeBiden), Twitter (June 2, 2020), https://twitter.com/JoeBiden/status/1267841150326636545?s=20 ("I've said from the outset of this election that we are in a battle for the soul of this nation. Who we are. What we believe. And maybe most important—who we want to be. It's all at stake."); Donald J. Trump, YouTube (August 15, 2020), https://youtu.be/rv1jYTWovOM ("If stupid people aren't elected next year, we're going to have one of the greatest years ever.").

[3] *See* Brittany Bernstein, *Postal Service warns 46 states and D.C. of Likely Mail-In Ballot Delays*, NATIONAL REVIEW (August 14, 2020), https://www.nationalreview.com/news/2020-election-mail-in-ballots-postal-service-warns-46-states-dc-of-likely-delays/; Eric Russell, *Two mail-sorting machines removed at USPS processing center in Scarborough*, KENNEBEC JOURNAL (August 19, 2020), https://www.centralmaine.com/2020/08/19/2-mail-sorting-machines-dismantled-in-maine-worker-says/.

pandemic.[4]

While Maine election practices and procedures have generally served the state well in the past,[5] the twin challenges presented by COVID-19 and the USPS change the calculus governing what is required under the Maine and United States Constitutions. These threats have raised the bar for the Defendants to justify laws and practices that burden the exercise of the right to vote.

Under the Maine Constitution, the right to vote is a "fundamental right," *Opinion of the Justices*, 2017 ME 100, ¶ 49, 162 A.3d 188, 207, as well as a "sacred privilege." *Opinion of the Justices*, 54 Me. 602, 605 (1867).[6] The Maine Constitution also guarantees the fundamental right to safety. Me. Const. art. I, §1 ("All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of . . .pursuing and obtaining safety. . .").

These guarantees, read in concert with one another, strengthen the claims of Plaintiffs in this case, and they impose a more stringent burden on Defendants than the federal constitution alone.

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[4] *See* Me. Exec. Order No. 56 FY 19/20 (June 3, 2020) (recognizing that COVID-19 is "highly contagious and presents a serious risk to live and health" of voters, poll workers, and election officials).

[5] *See* Matthew Dunlap, *We're confident July election will be a successful mission*, BANGOR DAILY NEWS (June 22, 2020) (observing that Maine election law and procedures "work really well.").

[6] *See also* Me. Exec. Order No. 56 FY 19/20 (June 3, 2020) (acknowledging "the fundamental right of the citizenry to debate and vote on budgets and public policy matters").

In light of Maine's explicit constitutional commitment to the right to vote safely, Defendants should only be allowed to maintain the challenged laws and practices if they can prove that they are narrowly tailored to serve a compelling government interest, and that they are the least restrictive ways available for satisfying those interests.

Amici respectfully submit that Defendants are unlikely to satisfy that standard for any of the challenged laws and practices. In particular, the election day receipt deadline, the signature matching provisions, and the postage tax all violate both the Maine and United States Constitutions, in light of the challenges posed by COVID-19 and the USPS.

II. THE MAINE CONSTITUTION PROVIDES INDEPENDENT AND ENHANCED PROTECTION FOR THE RIGHT TO VOTE SAFELY.

The federal Constitution protects and secures the right to vote in numerous important ways: prohibiting discrimination in voting, *see* U.S. Const. amend. XVI (race); U.S. Const. amend. XIX (sex); U.S. Const. amend. XXVI (age); removing barriers to voting, *see* U.S. Const. amend. XXIV (poll tax); and requiring fair processes for the conduct of elections, *see* U.S. Const. amend. V (due process), U.S. Const. amend. XIV (same). But these federal constitutional provisions must be read as setting the floor, not the ceiling, when it comes to the protection of individual rights in Maine. *See State v. Collins*, 297 A.2d 620, 626 (Me. 1972) (holding that States are free to "adopt a higher standard" than that set by the Federal Constitution).

Plaintiffs assert multiple violations of the Maine Constitution, including that all challenged provisions constitute an undue burden on the fundamental right to vote, and that certain provisions violate Maine's guarantee to procedural due process or the right to free speech. *See* Compl. at 37-49 (alleging violation of Me. Const. Art. 1, §§ 4, 6-A). When evaluating these claims, this Court must give weight to independent protections in the Maine Constitution, as well as Maine's public policy to ensure that Maine voters are able to vote using the postal system with as few barriers as possible.

The Law Court has instructed that the interpretation of the Maine Constitution is not dependent on the United States Constitution. If the provisions challenged by plaintiffs in this case are found to violate the protections of the Maine Constitution, no further inquiry is required or appropriate, *State v. Flick*, 495 A.2d 339, 344 (Me. 1985) (instructing courts to "examine the state constitutional claim before reaching any federal question."), and no additional federal review of the decisions of Maine's courts will lie. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (holding that the Supreme Court will refuse to decide cases where there is an adequate and independent state ground out of respect for the independence of state courts).

Although the Law Court has stated that the Maine Constitution provides rights to due process, equal protection, and free speech that are at least coextensive to the parallel rights guaranteed by the Federal Constitution, *see, e.g.*, Pls' Mot. for Preliminary Inj. at 15, 17 (citing cases), state constitutional provisions do not

"*depend* on the interpretation of" parallel federal provisions. *State v. Flick*, 495 A.2d 339, 343 (Me. 1985) (emphasis in original). As the Law Court has explained, "to construe such opinions as expressing a limitation upon the scope of" a state constitutional provision "would be to stand the state-federal relationship . . . on [its] head[]." *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982); *see also State v. Bouchles*, 457 A.2d 798, 801–02 (Me. 1983) ("[W]e reject any straitjacket approach by which we would automatically adopt the federal construction of the fourth amendment ban of 'unreasonable searches and seizures' as the meaning of the nearly identical provision of the Maine Constitution.").

Indeed, the Law Court has instructed that state courts should not follow federal precedent where the express public policy of the State of Maine compels a different result. *See Collins*, 297 A.2d at 626 (considering "public policy for the State of Maine" and relevant "values" in interpreting the Maine Constitution); *see also Caouette*, 446 A.2d at 1122 (relying on Maine "values" expressed in *State v. Collins* to depart from federal precedent and suppress defendant's inculpatory statements even in the absence of police conduct); *cf. Bates v. Dept. of Behavioral and Developmental Servs.*, 2004 ME 154, ¶¶ 43–46, 863 A.2d 890 (holding that terms of consent decree required more than compliance with minimum federal constitutional standards when "Maine statutes in effect at the time the complaint was filed formed a basis for the plaintiffs' assertion of broader substantive rights than those protected by the [Fourteenth Amendment of the] United States [Constitution]").

For example, in *State v. Collins*, the Law Court considered the evidentiary standard that should apply to the admissibility of a confession in state courts. 297 A.2d at 625–26. The Law Court recognized that the U.S. Supreme Court had previously held that the prosecution bore the burden of establishing the voluntariness of a confession by preponderance of the evidence, but not beyond all reasonable doubt. *Id.* As the Law Court explained, the U.S. Supreme Court had reached that result by determining that, while the federal Fourth and Fifth Amendment exclusionary rules were aimed at deterring lawless conduct by police, the public interest still weighed more heavily in placing potentially probative evidence in front of juries. *Id.* at 626.

Despite the overarching similarities between the state and federal constitutional provisions at issue, the Law Court in *Collins* refused to adopt the U.S. Supreme Court's approach. In so doing, the Law Court recognized that federal decisions on this matter were merely intended to "prescribe[] a mandatory minimum standard," and that States were "free, pursuant to their own law, to adopt a higher standard." *Id.* (*quoting Lego v. Twomey*, 404 U.S. 477, 489 (1972)). Therefore, quoting dissenting opinions from the Supreme Court, the Law Court held that

> [i]n assessing public policy for the State of Maine and "the appropriate resolution of the values (we) find at stake," we go beyond the objective of deterrence of lawless conduct by police and prosecution. We concentrate, additionally, upon the primacy of the value . . . of safeguarding ". . . the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances."

Id. (*quoting Lego*, 404 U.S. at 491 (Brennan, J., dissenting)). "Since this value has been endowed with the highest propriety by being embodied in a constitutional guarantee," the Law Court held "that it must be taken heavily into account in the formulation of the public policy of this State." *Id.*

Likewise here, this Court must consider Maine's values and public policies when considering whether the challenged provisions violate the Maine Constitution. As in *Collins*, this case implicates a "value [that] has been endowed with the highest propriety by being embodied in a constitutional guarantee"—specifically, the right to safety. *See Collins*, 297 A.2d at 626; Me. Const. art. I, § 1 (providing the "inherent and unalienable right[] . . . to pursu[e] and obtain[] safety"). The right to pursue and obtain safety is guaranteed by the very first section of the first article of the Constitution of the State of Maine, giving this right as good a claim as any to represent the sort of express public policy of the State of Maine that justifies protection beyond that provided by the United States Constitution. The right to safety has no federal counterpart and has never been explicitly interpreted by the Maine Supreme Judicial Court. At a minimum, however, the right to safety must ensure the right to safely exercise the core fundamental right to vote. *See, e.g.*, *Dishon v. Me. State Ret. Sys.*, 569 A.2d 1216, 1217 (Me. 1990) (referencing the "fundamental interest" of the "right to vote"); *Jones v. Maine State Highway Comm'n*, 238 A.2d 226, 229 (Me. 1968) (referencing the "civil right . . . to vote").

Accordingly, the right to vote *safely* must be core to this Court's inquiry under the Maine Constitution. For instance, when conducting the undue burden inquiry

under Article I, section 6-A of the Maine Constitution, the question is not merely whether each of the challenged provisions burdens the right to vote, but whether it burdens the right to vote *safely*. Whenever a provision imposes "severe" burden on the right to *safely* cast a vote—in the midst of a pandemic and historic meddling with the USPS—this court ought to apply its strictest level of scrutiny. *See, e.g.*, Pls. Mot. for Prelim. Injunction at 12 (citing *Perez-Guzman*, 346 F.3d 229, 241 (1st Cir. 2003); *Norman v. Reed*, 502 U.S. 279, 280 (1992) (stating that severe burdens on the right to vote "must be narrowly drawn to advance a state interest of compelling importance"). Only if the challenged provisions are necessary to serve a compelling state interest and narrowly drawn to achieve that end should they be allowed to be enforced. *See Mowles v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 160, ¶ 20, 958 A.2d 897, 903 (explaining the strict scrutiny standard).

III. DISENFRANCHING VOTERS WHO MAIL THEIR ABSENTEE BALLOTS AHEAD OF ELECTION DAY VIOLATES THE RIGHT TO VOTE SAFELY.

The interplay of the right to vote and the right to pursue and obtain safety is most conspicuous in relation to Plaintiffs' challenge to the law governing the date by which an absentee ballot must be received in order to be counted. As Plaintiffs note, Maine's requirement that an absentee ballot must be received by 8:00pm on election day, *see* 21-A M.R.S. §755, "means that, regardless of the date a ballot is postmarked, and regardless of how responsible a voter was in timely mailing their absentee ballots," voters are at risk of having their votes ignored through no fault of their own. *See* Complaint, ¶133.

More Maine voters than ever before are likely to vote by absentee ballot in the November election, in order to avoid crowded polling places that might present a risk to their health and safety.[7] But, just as more and more voters are planning to take advantage of absentee voting (which heavily relies on mail delivery to get blank ballots into the hands of voters and completed ballots into the hands of election administrators), the USPS has dramatically reduced its services, with rural states (like Maine) among the hardest hit.[8] The USPS has itself acknowledged, in a letter to Maine's Secretary of State, that the received-by ballot deadline is unworkable and will likely lead to mass disenfranchisement of Maine voters.[9]

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[7] AP, *This November will be a big test for absentee voting in Maine*, BANGOR DAILY NEWS (July 20, 2020), https://bangordailynews.com/2020/07/20/politics/this-november-will-be-a-big-test-for-absentee-voting-in-maine/ (quoting Maine's Secretary of State observing that "November's going to be a different game. With social distancing and a much, much heavier turnout, we'll probably strongly push absentee balloting again."); Scott Thistle, *Flurry of absentee voting continues right up to Maine's unusual July primary*, PORTLAND PRESS HERALD (July 13, 2020), https://www.pressherald.com/?p=5542238 (reporting that more than 190,000 voters requested absentee ballots for Maine's July 2020 primary election).

[8] Jack Healy, *The Chick's in the Mail? Rural America Faces New Worries With Postal Crisis*, NEW YORK TIMES (August 21, 2020), https://nyti.ms/3aJ1aKg (reporting that rural residents across America have been affected in several ways by the crisis at the USPS, and that "[o]n Native American reservations, among the country's most remote places, families are driving five hours to get medicine and worry about being disenfranchised in November.").

[9] *See* Scott Thistle, *Mills considers safeguards for absentee voting, after warning letter from postal service*, PORTLAND PRESS HERALD (August 14, 2020) https://www.centralmaine.com/2020/08/14/mills-considers-safeguards-for-absentee-voting-after-warning-letter-from-usps/ (quoting the Governor's spokeswoman as indicating that

These issues materially impact the court's analysis of the constitutionality of Maine's deadline for counting ballots. As a result of administrative problems at the USPS—which are well beyond the influence of any Maine voter who does not also hold high federal office—there will be wildly disparate treatment of similarly situated voters based on the vicissitudes of mail service and operations. Even groups of voters who all mail their ballots back to their town clerks on the same day may find that some of their ballots are received on time, some late, and some not all. Even if the "received by" deadline was constitutional when it was enacted, the standard for what constitutes equal treatment under the law changes as circumstances change. *See Doe v. Rowe*, 156 F. Supp. 2d 35, 51 (D. Me. 2001) (noting that present day understanding, rather than historical perspective, govern in constitutional analysis.).

Requiring that ballots be received by 8:00pm on Election Day in order to be counted, in light of current circumstances, significantly interferes with the fundamental right to vote safely, and this interference does not satisfy strict scrutiny. While the "received by" requirement serves an undeniable government interest in facilitating a reasonably prompt determination of the result of the November election, this interest must give way in order to ensure that the fundamental right of voters to vote absentee and to have their votes counted is not needlessly undermined. Maine voters are accustomed to not knowing the results of

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the Governor is deeply concerned about the risk of "ballots delayed, ballots lost in the mail, ballots not counted.").

an election on Election Day, as a result of Maine's ranked choice voting system.[10] Counting ballots that are postmarked by Election Day will not pose a sufficiently significant burden on election operation to outweigh the right of a voter to cast a vote and have it counted.

IV. THE LACK OF PREPAID POSTAGE IS AN UNCONSTITUTIONAL POLL TAX.

The Twenty-Fourth Amendment plainly and unambiguously bans poll taxes. It provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV; s*ee Harman v. Forssenius*, 380 U.S. 528 (1965) (applying amendment). The Maine legislature repealed Maine's poll tax (formerly 36 M. R. S. § 1381) in 1973, with the intent of expunging "every vestige of the poll tax from the effective statutes of Maine." *Berry v. Daigle*, 322 A.2d 320, 324 (Me. 1974).

Federal courts have also construed the Equal Protection Clause of the Fourteenth Amendment as including a prohibition on poll taxes with respect to all elections. *See Harper v. Va. State Bd. of Elect.*, 383 U.S. 663, 666 (1966) ("We

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[10] *See* Sean Stackhouse, *Ranked-choice voting results in six races expected Tuesday*, NEWS CENTER MAINE (July 21, 2020) https://www.newscentermaine.com/article/news/politics/maine-politics/ranked-choice-voting-results-in-six-races-expected-tuesday/97-997d3526-a4e1-41c5-a34d-c82a37683e5c (reporting that election results from the July 2020 primary election would be available one week after the election).

conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."). Poll taxes are anathema to our democracy because "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.*

This court should hold that the prohibition on poll taxes extends beyond the explicit type of poll tax eliminated from Maine law four decades ago to include as well any form of payment required by the government in order to vote, because the intent of the legislature, as recognized in *Berry*, was to expunge every vestige of the poll tax from Maine law, and it is the duty of courts to effectuate the intent of the legislature. *State v. Kendall*, 2016 ME 147, ¶ 14, 148 A.3d 1230, 1234. De facto poll taxes are just as significant a burden, and are just as incompatible with our basic democratic values, as direct poll taxes.

Poll taxes are unconstitutional regardless of how small the amount, regardless of whether voters can afford them, and regardless of whether voters end up paying the amount. *See Harper*, 383 U.S. at 668 (poll taxes are unconstitutional "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it."). Saving the government money is never a legitimate reason to impose a poll tax. *See Harman,* 380 U.S. at 544 ("the poll tax, regardless of the services it performs, was abolished by the Twenty-fourth Amendment").

Courts have recognized that the imposition of burdens on the right to vote, such as requirement that voters purchase and produce specific documents in order to vote, also constitutes an unconstitutional poll tax. The most common examples of de facto poll taxes are associated with voter ID laws that require voters to purchase particular forms of photo identification in order to vote. *See, e.g., Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 274-79 (Wis. 2014) (explaining that courts "have characterized payments to government agencies to obtain documents necessary to voting as a de facto poll tax"). Thus, for example, Georgia's Voter ID law was found to impose an impermissible poll tax because photo identification cost money at the time. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366-67 (N.D. Ga. 2005). But, once Georgia made photo identification free, the same court concluded there was no poll tax. *See Common Cause/Georgia*, 439 F. Supp. 2d 1294, at 1355-56 (N.D. Ga. 2006). Paying for a stamp to safely vote is indistinguishable from paying for an identification card in order to register to vote.

And, a poll tax is an unconstitutional abridgment of the right to vote even if there are alternative ways to vote that are free but are still materially burdensome. *See Harman*, 380 U.S. at 538, 541 (poll tax is an unconstitutional "abridgment of the right to vote" even when there exists an alternative option, when the alternative still "imposes a material requirement" on those "who refuse to surrender their constitutional right to vote . . . without paying a poll tax."). The alternative method of voting is considered "material" even if it is not "onerous" and even if the alternative is easier to do than paying a poll tax. *Id.* at 542 (poll tax remains

unconstitutional even if alternative method is "somewhat less onerous[] than the poll tax. . . . [T]he poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed."). Thus, for example, the Supreme Court held that a $1.50 poll tax was unconstitutional even if a voter could avoid paying the tax by obtaining or creating a certificate of residence for free and delivering it in person to local election officials. *See id.* at 541-43. Because obtaining a free certificate of residence was still a material burden, and had to be done on an annual basis, the poll tax unconstitutionally abridged the right to vote. *See id.*

In sum, the government imposes an unconstitutional poll tax not only when it does so directly, but also when it does so indirectly by requiring voters to spend money to satisfy a prerequisite to voting. The poll tax is an unconstitutional abridgment of the right to vote even if alternative methods are available to vote, when such alternative methods are still materially burdensome.

Maine's requirement that voters furnish their own postage in order to vote absentee is an unconstitutional abridgment of the right to vote even though there are alternative ways to vote for free, because such alternatives are still burdensome for those who do not want to pay the postage tax. *See Harman*, 380 U.S. at 542. The burden of the postage tax is more than simply the cost of a stamp—it also includes the expense (and risk) of travelling to a public post office during a health crisis to purchase a stamp. During the COVID pandemic, voting by absentee ballot is more than a simple preference; for many voters, it is matter of protecting their health and safety, as well as the health and safety of their families and communities. Voting by

mail is the safest and most responsible way for almost all Maine voters to cast their ballots, but voters are being required to pay in order to exercise that right.

Under these circumstances, the state's imposition of a postage requirement effectively imposes an unavoidable monetary burden on the franchise. Even if that burden is slight, the government's interest in saving money does not justify it, regardless of how small the amount. Other states like Kansas, Iowa, and West Virginia have all been able to provide prepaid postage for mail-in voters apparently without incident. *See* K.S.A. § 25- 433; I.C.A. § 53.8; W. Va. Code § 3-3-5. Maine's failure to do so is unconstitutional.

V. REJECTING ABSENTEE BALLOTS WITHOUT NOTICE AND AN OPPORTUNITY TO CURE IS UNCONSTITUTIONAL.

Allowing election officials to reject absentee ballots for perceived mismatches between the signature on a ballot and the signature on a voter's registration card, without first informing the voter of the rejection and giving the voter an opportunity to address any problems unconstitutionally interferes with the right to vote.

Amici note that Defendant Secretary of State Dunlap attempted to address this problem for the July 2020 primary election, through the issuance of guidance to Maine election clerks, requiring them to "make a good faith effort to notify the voter within 24 hours that the ballot has been rejected, except when a ballot is received less than 24 hours before election day." *Guidance for Curing Rejected Absentee Ballots for the July 14, 2020 Elections Pursuant to Executive Order 56 FY 19/20, Section I, Paragraph M*, Maine Secretary of State (June 29, 2020). For ballots received within 24 hours of election day, clerks were told they "may make the

notification if time permits." *Id.* No such guidance, though, has been issued for the November 2020 general election.

The existence of this guidance document demonstrates that providing a process for curing signature problems on ballots is feasible and administrable. Further, it demonstrates that the Defendant is aware that the rejection of a person's ballot for a perceived signature mismatch is a drastic step that must not be undertaken by government officials without adequate due process protections. This court should order the state to adopt these protections as a matter of constitutional law.

As numerous courts have recognized, once a state creates an absentee voting regime, it must administer it in accordance with the Constitution. *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, No. 1:20-CV-457, 2020 WL 4484063, at *53 (M.D.N.C. Aug. 4, 2020) (collecting citations). Maine law vests voters with the right to vote by absentee ballot. 21-A M.R.S. §751 (allowing that absentee ballots may "be cast at any election by any voter who requests an absentee ballot."). But, Maine law unconstitutionally permits election clerks, solely based on their own judgment, to deprive voters of that fundamental right. 21-A M.R.S. §756(2). There are no standards governing the clerk's determination, nor is there any requirement in statute that the clerk inform the voter that their ballot will be rejected. Lack of standards combined with a lack of review is a sure recipe for an unconstitutional deprivation of the fundamental right to vote. *See Democracy N. Carolina*, No. 1:20-CV-457, 2020 WL 4484063, at *54 (concluding that rejecting ballots "for a reason

that is curable, such as incomplete witness information, or a signature mismatch" without first giving notice and an opportunity to be heard violates the guarantee of due process).

This deprivation is especially injurious during the current public health crisis. The Maine Constitution's guarantee of the right to pursue and obtain safety (by, for example, voting by absentee ballot) imposes a heightened requirement on the state to justify any interference with absentee voting. No signature is required for voters to vote in person on election day, but for many voters in Maine, for this particular election, voting in person is not consistent with pursuing or obtaining safety. The court should require Maine to adopt a mandatory process for notifying voters of curable defects in their absentee ballots and providing sufficient process for curing those defects.

VI. CONCLUSION.

For these reasons, the court should grant a Preliminary Injunction in favor of Plaintiffs.

Respectfully submitted,

September 1, 2020,

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