

No. 08A138

SUPREME COURT OF THE UNITED STATES

HERBERT J. HOFFMAN,

Applicant,

v.

MAINE DEPARTMENT OF SECRETARY OF STATE, et al.,

Respondents.

MEMORANDUM IN RESPONSE TO ORDER OF AUGUST 15, 2008, ON
EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE
JUDGMENT OF THE SUPREME JUDICIAL COURT OF MAINE PENDING THE
FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable David H. Souter, Associate Justice of the Supreme Court
and Circuit Justice for the First Circuit:

The Maine Department of the Secretary of State (hereinafter “Secretary” or
“Secretary of State”) submits this memorandum in response to the Court’s Order of
August 15, 2008, directing both the Secretary and John Knutson to respond to the
federal constitutional issue raised by Herbert Hoffman in his Emergency
Application for Stay, as well as to address the practical effects of a stay.

First, with regard to the practical effects of a stay, if a stay is granted on or
before August 29, 2008, Mr. Hoffman’s name will be printed on the ballots for the
upcoming general election as a candidate for the United States Senate; if a stay is
not granted by that date, Mr. Hoffman’s name will not appear on the ballots. For
the reasons explained below and in the Affidavit of Julie L. Flynn submitted to the

Court as Exhibit F to the Emergency Application for Stay, the printing of ballots has to begin by the next business day after August 29, in order for absentee ballots to be distributed to military and overseas voters in a timely manner, and it is not possible to print alternate ballots, reprint ballots or substitute different ballots after that date.

Second, the Secretary of State's position, as argued to the court below, is that to interpret Title 21-A, section 354, subsection 9 of the Maine Revised Statutes to invalidate all the signatures on three of Hoffman's nominating petition forms on the grounds that the signature of one voter on each petition was not made in the circulator's presence poses a serious constitutional issue under the First and Fourteenth Amendments to the federal Constitution. The Maine Supreme Judicial Court ("SJC") disagreed, and adopted that interpretation of the statute without finding a constitutional problem.

I. If a Stay is Granted by August 29, 2008, Herbert J. Hoffman's Name Will Be Printed on the General Election Ballot As a Candidate for the United States Senate.

From a practical standpoint, *iacta alea est* – the die is cast – as of August 29, 2008. If a stay is in effect on that date, Mr. Hoffman's name will appear on the ballot for the November 4, 2008 general election; and if a stay is not then in effect, Mr. Hoffman's name will not be on the ballot for that election. As explained in Deputy Secretary of State Julie L. Flynn's Affidavit, dated August 13, 2008 (Exhibit F to the Emergency Application for Stay), the Secretary of State's Elections Division must provide to the state's printer, by the close of business on August 29, 2008, the

final version of the ballots in order for the ballots to be distributed to absentee voters far enough in advance of the November 4 election to enable their votes to count. Flynn Aff. ¶ 17. To avoid disenfranchising those voters, the Secretary needs to act by that date.

If this Court grants a stay of enforcement of the July 28, 2008, decision of the SJC pending the filing and disposition of a petition for writ of certiorari as requested by Hoffman, that will reinstate the Superior Court's judgment affirming the Secretary of State's determination that Hoffman qualified for the ballot.¹ If a stay is granted by August 29, 2008, and in effect at the close of business on that day, the Secretary of State will give its printer final approval to print ballots including Herbert Hoffman's name as a candidate for the United States Senate. If the requested stay is denied, or not granted, by the close of business on August 29, 2008, the ballots will be printed without his name on them. The printed ballots will be sent to local election officials on September 22, 2008, for distribution to absentee voters.

The August 29 date is a deadline necessitated by the complicated logistics of designing, proofing, printing, packaging and distributing hundreds of thousands of ballots to approximately 550 locations across Maine, and by the amount of time required to enable absentee voting by registered Maine voters who are in the

¹ As of today, the SJC has not issued a mandate in this case, pursuant to Rule 14(a) of the Maine Rules of Appellate Procedure. For purposes of this filing, the Secretary assumes that the mandate will have issued by the time the Circuit Justice acts on Hoffman's Emergency Application for Stay. At the time this is being written, however, the Secretary of State's determination that Hoffman qualified for the ballot is technically still in effect, since the filing of the original action by John Knutson did not stay that determination, pursuant to Rule 80B(b) of the Maine Rules of Civil Procedure.

military, or are civilians living overseas. The Secretary of State can design two sets of ballots – one with Hoffman’s name and one without – between now and August 29. The printer, however, does not have the time or the capacity between August 29 and September 22 to produce and distribute more than one set of ballots for purposes of absentee voting. Flynn Aff. ¶ 16. For that reason, and to avoid disenfranchising absentee voters overseas, to grant the relief that Hoffman is requesting would require that a stay be issued by August 29, 2008.

II. Maine’s Statute, Me. Rev. Stat. tit. 21-A, § 354(9), as Interpreted by the Maine Law Court, Imposes a Severe Burden on First Amendment Rights of Voters Who Signed Hoffman’s Petitions and Is Not Narrowly Tailored to Achieve a Compelling State Interest.

The Secretary’s position, as articulated to the SJC, is that to void nominating petition forms in their entirety, and invalidate approximately 90 otherwise valid signatures on Hoffman’s nominating petitions based on a factual finding that one signature on each petition form was not signed in the circulator’s presence, imposes a severe burden on the First Amendment rights of voters who signed Hoffman’s petitions and is not narrowly tailored to achieve a compelling state interest.

Hoffman’s only constitutional challenge is to the SJC’s conclusion that the remedy that must be applied when a circulator’s oath is found to be inaccurate as to one signature on the petition is to invalidate the entire petition form on which that signature appears. As noted on page 21 of his Emergency Application for Stay, Hoffman does not dispute the validity of Maine’s regulatory requirements for non-party candidates to gain access to the general election ballot. In particular, he

acknowledges that the State of Maine may require circulators to verify nomination petitions by taking an oath that all signatures were made in the presence of that circulator, as required by Me. Rev. Stat. Ann.tit. 21-A § 354(7)(A) (West 2008). He also does not dispute that the Secretary of State may “refuse to count any signature that is not made in the presence of the circulator or otherwise invalid; and [may] discard an entire petition that is tainted by fraud.” Application, at 21.

The Secretary of State argued to the SJC that Maine’s statute, Me. Rev. Stat. Ann. tit. 21-A, § 354(9), was susceptible of two interpretations, the stricter one of which would render the statute constitutionally suspect, at least as applied to Hoffman’s situation. *See* Brief of Respondent, Maine Department of Secretary of State, dated July 23, 2008 (Exhibit K to Emergency Application for Stay) at 19-22. The SJC adopted the stricter interpretation of the statute, advocated by Knutson, and held that if a circulator’s oath is inaccurate as to any one signature on a nominating petition form, then the petition “must be stricken in its entirety,” thereby voiding all of the otherwise valid signatures on the same form. *Knutson v. Dep’t of Secretary of State*, 2008 ME 124, ¶ 3 (Exhibit A to the Emergency Application for Stay, at 2). The court then dismissed, without much discussion, the Secretary’s concerns regarding the constitutionality of this result. *Id.* at ¶ 22.

There seems to be no dispute that when considering a challenge to a state election law, a court should apply the flexible standard of review set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983). This entails first weighing “the character and magnitude of the asserted injury to the rights protected by the

First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” and then evaluating “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* Full consideration under *Anderson* contemplates an analysis of the severity of the burdens imposed by Maine’s statute, the “legitimacy and strength” of the state’s interests that the statute is designed to address, and the extent to which those interests render it necessary to impose the burden that voiding entire petition forms imposes on the rights of political expression, association, and voting of the voters who signed Hoffman’s petition. The SJC did not address *Anderson* or articulate how it would apply this analysis. *Knutson*, 2008 ME 124, ¶ 22.

Hoffman does not appear to dispute that Maine has compelling interests to support the ballot access requirements set forth in Title 21-A, section 354, including the circulator’s oath requirement in subsection 354(7)(A). Application, at 21. Those interests are served by invalidating any signatures found not to have been made in the circulator’s presence, as well as by invalidating entire petitions where there is evidence of fraud or some basic defect in the oath, such as that it was not properly executed before a notary public or other person authorized to administer oaths. However, to void an entire petition form on the basis of evidence that one signature on the form was not made in the circulator’s presence, and thereby invalidate otherwise valid signatures on the same petition form, is a sweeping remedy that appears to go beyond what is necessary to further the state’s interests in preventing election fraud, preserving the integrity of the petition process, and ensuring that

non-party candidates demonstrate a significant modicum of support from registered voters in order to gain access to the general election ballot.

Respectfully submitted,

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Dated: August 19, 2008

CERTIFICATE OF SERVICE

I, Paul Stern, Deputy Attorney General for the State of Maine and a member of the bar of this Court, hereby certify that on this 19th day of August, 2008, a copy of the foregoing Memorandum in Response to Order of August 15, 2008, on Emergency Application for a Stay of Enforcement of the Judgment of the Supreme Judicial Court of Maine Pending the Filing and Disposition of a Petition for a Writ of Certiorari was served by United States regular mail and electronic mail upon:

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

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