GESSLER BLUE LAW

December 21, 2023

**Via Email:** SOS.office@maine.gov
Shenna Bellows
Secretary of State
State of Maine
Department of the Secretary of State
148 State House Station
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*Re: In re: Challenge to Primary Nomination Petition of Donald J. Trump, Republican Candiate for President of the United States*

**PRESIDENT DONALD J. TRUMP'S SUPPLEMENTAL BRIEFING REGARDING THE OPINION ISSUED IN *ANDERSON V. GRISWOLD***

## I. The Colorado decision has no effect, because Maine law does not allow the Secretary to remove President Trump from the ballot.

Challengers in this matter claim that President Trump is disqualified for office under Section Three of the Fourteenth Amendment. This is not an appropriate or valid "challenge" under section 336 procedures. Therefore, Maine law is dispositive of these challenges: the Secretary lacks authority to remove President Trump from the ballot under sections 336 and 337.

Section 336 provides a narrow avenue for voters to use the section 337 procedures to challenge the veracity of the "declaration" portions of a candidate's consent.[1] The "declaration" portion of the consent form is limited to "the candidate's place of residence

[1] *See* 21-A.M.R.S. § 336(3) ("If, pursuant to the challenge procedures in section 337, any part of the declaration is found to be false by the Secretary of State, the consent and the primary petition are void").

and party designation."[2] It does not include the "statement" that "the candidate meets the qualifications for office."[3] Challengers' claims are outside the scope of section 336. First, they do not challenge the "declaration." Instead, they solely challenge President Trump's qualifications for office, which are addressed in the statement.

Second, section 336 limits challenges to whether "any part of the declaration is false." There is no dispute that all of President Trump's representations on his consent form are true. To wit, the consent form asks whether a candidate meets the three Article II qualifications to be President of the United States and asks the candidate to certify that he or she meets the qualifications "listed above." There is no dispute that President Trump meets those qualifications. This dispositive point is conceded by Challengers. Challengers' claim that President Trump does not meet a qualification he was not asked about. Whatever the merits of that claim, the fact that he was not asked on his consent form and that all of the information regarding qualifications on his consent form is true means that the section 336 and 337 challenge process cannot provide the relief sought.

The Colorado Supreme Court decision is irrelevant for assessing the scope of the challenge process under Maine law. Challengers' claim is outside the scope of this process. Thus, the Colorado Supreme Court decision has no impact on these proceedings: Maine law is dispositive. The Secretary should therefore follow the example of the Massachusetts Secretary, who has declared the President Trump will remain on the Massachusetts primary

[2] 21-A.M.R.S. § 336(3).

[3] *Id.*

ballot, regardless of the Colorado Ruling.[4] Or the example of the New Hampshire Secretary, who has refused to take action removing President Trump from New Hampshire's ballot, in line with guidance from the New Hampshire Attorney General.[5]

## II. The Colorado decision does not bar President Trump from contesting the Challenger's factual allegations.

The Challengers have "noted" in their notice of supplemental authority the belief that President Trump cannot contest their factual allegations, citing the doctrine of collateral estoppel. They are wrong; collateral estoppel simply does not apply.

The Maine Supreme Court has set forth general principles governing collateral estoppel. "As a general matter, collateral estoppel is the issue preclusion component of the principle of res judicata. It prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding."[6] Further, the court has summarized the "longstanding" view that "Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was

[4] Ex. 1, Samantha J. Gross and Matt Stout, *Trump will appear on GOP primary ballot in Massachusetts despite Colorado Ruling, Galvin says*, Boston Globe, December 20, 2023.

[5] Ex. 2, Letter from John M. Formella, to David M. Scanlan and Ballot Law Commission, Sept. 13, 2023.

[6] *Gray v. TD Bank, N.A.,* 2012 ME 83, ¶10.

entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action."[7]

### A. Because the Colorado Supreme Court Stayed Its Decision, The Decision of the Colorado Supreme Court is Not "Final" for Estoppel Purposes

The decision of the Colorado Supreme Court should not be considered a "final judgment" for purposes of collateral estoppel. The Colorado Supreme Court did something unusual: it recognized "that we travel in uncharted territory, and that this case presents several issues of first impression."[8] In light of this recognition—and unlike in a typical case—the Colorado Court explicitly sought "to maintain the status quo pending any review by the U.S. Supreme Court" by "stay[ing] [its] ruling until January 4, 2024."[9] It further provided that "the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court."[10] As a result, until at least January 4, and then until at least such time as the U.S. Supreme Court rules on the matter, President Trump's name remains on the ballot in Colorado. Given the tentative and conditional nature of the ruling, *Anderson v. Griswold* should not be given preclusive effect.

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[7] *Macomber v. MacQuinn-Tweedie*, 2003 ME 121 (2003) (internal citations omitted).

[8] Opinion, *Anderson v. Griswold*, 2023 CO 63, ¶ 7 (Dec. 19, 2023) ("Opinion").

[9] *Id.* at 9.

[10] *Id.*

Tellingly, giving *Anderson* preclusive effect in this proceeding would give the decision of the *Colorado* Supreme Court greater practical impact in *Maine* than in Colorado. As of today, President Trump is still on the ballot in Colorado. He will remain on the ballot until at least January 4, and then until the Supreme Court issues an order on any appeal. Under these circumstances, the Colorado decision should not be relied upon as "final" to remove President Trump from the ballot here in Maine.

The situation in Colorado is not without precedent. As the Court of Appeals for the Fourth Circuit observed, "it is both the majority position among the federal courts and the position adopted by § 10–702 of the Maryland Uniform Recognition Act that the existence of a pending appeal does not render a judgment unenforceable nor suspend its preclusive effects *absent a party obtaining a stay from either the rendering or enforcing court.*"[11] Similarly, the Restatement (Second) on Judgments § 13, comment f, observes that in "some jurisdictions" an appeal renders a judgment nonfinal "when the appellant in fact obtains a stay." President Trump has obtained a stay *sua sponte* from the rendering court. In light of this stay, the findings of the Colorado court should be denied preclusive effective pending appeal.

This approach would yield a result consistent with guidance from leading procedural scholars. Wright and Miller observe "[s]ubstantial difficulties result from the rule that a final trial-court judgment operates as res judicata while an appeal is pending. The major problem is that a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed. In some cases, litigants and the courts have

[11] *Guiness PLC v. Ward*, 955 F.2d 875, 898 (4th Cir. 1992) (emphasis added).

collaborated so ineptly that the second judgment has become conclusive even though it rested solely on a judgment that was later reversed. This result should always be avoided."[12] As a result, "[t]hese difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying trial and perhaps pretrial proceedings pending resolution of the appeal in the first action . . . Dismissal or stay of the second action are most attractive when there is a reasonable prospect that determination of the appeal in the first action will establish res judicata effects that preclude the entire second action."[13] Here, these "difficulties" can be avoided by dismissing the challenges. This is particularly true given that action by the United States Supreme Court in *Anderson* is likely to elucidate the relevant law nationwide.

In light of the "uncharted territory" in which *Anderson* treads and the *sua sponte* stay of the Colorado Supreme Court's decision, preserving the status quo with President Trump on the ballot pending appeal to the United States Supreme Court, *Anderson* should not be viewed as a "final" judgment for purposes of collateral estoppel and should not be given any preclusive effect at this time. Instead, this matter should be dismissed and resolved only later, with the benefit of the Supreme Court's action on a near-certain forthcoming petition for certiorari.

**B. The Challengers are not the same parties – and not in privity with – the Colorado electors.**

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[12] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4443 (footnotes omitted).

[13] *Id.*

Collateral estoppel cannot apply because the Challengers in Maine are not the same individuals who challenged President Trump in Colorado. Nor could they be. In Colorado, only registered Colorado voters may file a petition to remove a candidate from the ballot in Colorado,[14] and the Challengers in this case are not Colorado voters. Likewise, in Maine "only a registered voter . . . may file a challenge."[15] And of course the voters who challenged President Trump in Colorado are not Maine voters.

Likewise, the Challengers are not privies of the Colorado voters. "Privity exists when two parties have a commonality of ownership, control, and interest in a proceeding. Privity requires that the parties' interests in the first litigation be so intertwined as to represent one single legal right."[16]

Here, the Maine and Colorado voters brought entirely separate actions seeking relief under different state laws, using different procedures and standards. Neither set of challengers controlled the others. Nor does either set of voters have a legal interest in the other state's proceedings. Colorado voters are barred from voting for presidential candidates and electors in Maine, and Colorado voters likewise have no legal interest in who Maine voters may vote for in this state's presidential primary. The reverse is also true; Maine voters cannot vote for Colorado candidates, and they have no legal interest in whom Colorado

[14] Colo. Rev. Stat. § 1-1-113(1).

[15] 21 A.M.R.S. § 337.

[16] *Doe v. Forino*, 2020 ME 135, ¶11 (internal citations and quotations omitted).

voters may choose in that state's presidential primary. Each state is different – each state has different procedures for candidate qualification, and who appears on presidential primary ballots varies in each state. For example, President Joe Biden will not appear on New Hampshire's presidential primary ballot, and voters in other states have no legal interest in who appears on New Hampshire's primary ballot.

### C. President Trump did not have a full and fair opportunity to litigate the facts in Colorado.

Finally, for collateral estoppel to apply, there must be a full and fair opportunity to litigate the facts. This standard is more exacting than due process – for example, one can receive due process, yet still not have a "full and fair opportunity." In Colorado President Trump did not have a full and fair opportunity to litigate whether he "engaged in insurrection." As Justice Samour recognized in his dissent from the majority opinion in *Anderson*, "the truncated procedures and limited due process provided by [Colorado law] are wholly insufficient to address the constitutional issues currently at play."[17]

The Colorado hearing was a "procedural Frankenstein"[18] where President Trump was subjected "to the substandard due process of law:"[19]

> There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.

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[17] Opinion, J. Samour dissent, ¶ 330.

[18] *Id.* at ¶ 339.

[19] *Id.* at ¶ 276.

> There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.[20]

In sum, Justice Samour scathingly criticized the proceedings in Colorado: "I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom."[21] "[W]hat transpired in this litigation fell woefully short of what due process demands."[22] "How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?"[23]

By the same token, the Secretary should not "embrace" the proceedings as fair.

## III. The Secretary should wisely decline to follow a sharply divided Colorado court.

It was a sharply divided court that decided *Anderson*. The justices split four to three, and the unsigned majority opinion drew an unusually scathing dissent. And the majority opinion places Colorado far outside of the mainstream; it "travel[s] in uncharted territory" in

[20] *Id.* at ¶¶ 340-341.

[21] *Id.* at 342.

[22] *Id.* at ¶ 278.

[23] *Id.* at ¶ 346.

more ways than one. The Secretary would be wise to decline to follow the majority's flawed and fundamentally wrong opinion.

First, the Colorado majority opinion is a decisive minority nationwide. As briefed earlier, every other state court and state official has rejected one aspect or another of the majority opinion.

Second, the majority opinion interpreted Colorado law to allow the Secretary to remove President Trump from the ballot.[24] Maine law is different.

Third, the majority opinion drew three dissents, one of which was particularly scathing. For Justice Samour, the majority opinion was "hard for me to swallow"[25]

Fourth, the majority opinion erroneously found – without authority – that because states may select presidential electors, they also have "plenary" power to assess presidential qualifications.[26] Plenary means "complete in every respect: Absolute, Unqualified."[27] No court, administrative, or legislative body has ever opined that states have absolute authority to determine presidential qualifications.

Fifth, the majority opinion resolved a Section Three claim, by interpreting its scope and applying to President Trump. Yet it simultaneously argued that "the Electors [the

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[24] Opinion at ¶ 56.

[25] J. Samour Dissent at ¶ 275.

[26] Opinion at ¶ 53.

[27] "Plenary." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/plenary (last accessed Dec. 21, 2023).

Colorado challengers] have not asserted a constitutional claim."[28] This fundamental contradiction shows that the majority opinion rests on shaky grounds, and indeed every dissenting justice wrote separately to challenge this argument.

Sixth, the majority opinion held that the trial court could adjudicate a Section Three claim in a Colorado election proceeding, yet President Trump could not raise Fourteenth Amendment Due Process concerns in that same proceeding.[29] The Secretary should not similarly – and so cavalierly -- disregard President Trump's Due Process concerns.

Seventh, in determining that Section Three was self-executing, the majority opinion disregarded legislative history from Thaddeus Stevens,[30] widely considered "*the* political leader of the House and acting chairman of the Joint Committee on Reconstruction."[31] It also ruled contrary to the holding in *In re Griffin*, 11 F.Cas. 7 (C.C.D. Va. 1869)[32] -- a first in fifteen decades of American legal jurisprudence. Justice Samour rightly pointed out the severe failings in the majority opinion's approach in a scholarly and thorough analysis of Section Three,[33] including Congressional action taken to enforce Section Three.[34]

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[28] Opinion at ¶ 70.

[29] *Id.* at ¶ 80 and ¶ 88, n. 11.

[30] *Id.* at ¶ 98.

[31] *McDonald v. City of Chicago*, 561 U.S. 742, 762 (emphasis supplied).

[32] Opinion at ¶¶ 99-104.

[33] J. Samour Dissent at ¶¶ 285-313.

[34] J. Samour Dissent at ¶ 314.

Eighth, the majority opinion erroneously found that the Section Five of the Fourteenth Amendment – which states "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article" was not a textually demonstrable commitment to Congress to enforce the provisions of Section Three.[35]

Ninth, the majority opinion mangled the textual analysis of Section Three, improperly interpreting "office under the United States,"[36] "officer of the United States,"[37] and the importance of two separate oaths of office defined by the Constitution.[38]

Tenth, the majority opinion approved the district court's use of the January 6th report as evidence. This was a highly partisan report, that has been vigorously and zealously denounced by the vast majority of Republicans and conservatives, and a solid majority of unaffiliated voters properly rejected the investigation as a political exercise.[39] If the Secretary wishes to rise above partisan politics, she will reject the January 6th Report as a matter of

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[35] Opinion at ¶¶ 112-121.

[36] *Id.* at ¶¶ 129-143.

[37] *Id.* at ¶¶ 144-152.

[38] *Id.* at ¶¶ 153-159.

[39] "Poll: Majority of voters view Jan. 6 probe through political lens" October 22, 2021, avail. At https://thehill.com/hilltv/what-americas-thinking/578053-poll-majority-of-voters-say-jan-6-investigation-is-more-of-a/ accessed December 21, 2023; see also 58 percent say Jan. 6 House committee is biased: poll, August 2, 2021, avail at: https://thehill.com/homenews/house/565981-58-percent-say-jan-6-commission-is-biased-poll/ (last accessed Dec. 21, 2023).

principle. To do otherwise would constitute taking one side of a vigorously contested political debate.

Eleventh, the majority opinion recognized that there is no definition of insurrection as used in Section Three,[40] but it created one anyway, and as evidence relied on conclusory statements from the January 6th Report.[41]

Twelfth, the majority opinion simply recited the January 6th Report to search for evidence of "engagement,"[42] and most importantly misapplied First Amendment law. For example, it relied on *Schenck v. United States*[43] (a 1919 case that upheld the conviction of anti-war protestors for handing out leaflets during the First World War),[44] even though *Brandenburg v. Ohio* effectively replaced *Schenck's* "clear and present danger" with the "imminent lawless action" test.[45] The majority opinion also relied on "true threat" doctrine,[46] an approach never raised in this case and one that has little to do with the Brandenburg standards. And it again relied heavily on the January 6th report. The court's

[40] *Id.* at ¶ 176.

[41] *Id.* at ¶ 186.

[42] *Id.* at ¶ 197-224.

[43] *Schenck v. United States*, 249 U.S. 47 (1919).

[44] *Id.* at ¶ 232.

[45] *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

[46] *Id.* at ¶ 235.

highly restrictive approach to free speech is unlikely to withstand scrutiny, on appeal to the Supreme Court or over time upon reflection and analysis.

## IV. Maine's ranked choice voting provides a safety mechanism in the event President Trump is subsequently disqualified after the primary election.

President Trump will soon seek review of Colorado Supreme Court decision, and accordingly the applicability of Section Three should be settled before Maine holds its primary election. But even if the matter is not decided until after the election, Maine's voting procedures allow President Trump's supporters to make a valid, second choice.

Presidential primary elections in Maine are conducted through ranked choice voting.[47] Ranked choice voting provides voters the opportunity to rank their choices of candidates in order of preference.[48] The voter can rank as many or as few candidates as they want. In the initial round, only first-choice votes are considered. The tabulation of votes continues through multiple rounds until a candidate receives a majority, rather than a plurality, of the votes.[49] If a candidate received more than 50% of the first-choice votes, that candidate wins outright. But if no candidate receives more than 50% of the first-choice votes, an instant runoff process begins. The "last-place candidate"[50] in the first round is

[47] 21-A M.R.S. § 723-A.

[48] Maine's ranked choice voting has been challenged on constitutional grounds multiple times and has been ruled constitutional each time. *See Hagopian v. Dunlap*, 480 F. Supp. 3d 288 (D. Me. 2020); *Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Me. 2018).

[49] 21-A M.R.S. § 723-A(2).

[50] 21 M.R.S. § 723-A(1)(F) (Last-place candidate is defined as "the candidate with the fewest votes in a round of the ranked-choice voting count").

eliminated and the ballots that had the eliminated candidate as their first choice are then reassigned to the remaining candidates based on the voters' next preferences.

While President Trump does not endorse or take a position on the desirability of ranked choice voting, he notes that the Secretary has an opportunity to recognize that in the event of uncertainty, she may err by allowing voters to have the opportunity to vote for President Trump. If a court later determines that President Trump may not hold office, the voters will not "waste" their votes. At worst, a disqualified candidate can simply be treated as a last-place candidate for the purposes of ranked choice voting. The next candidate could be chosen based on the democratic will of the voters. Accordingly, the Secretary's embrace of ranked-choice voting may serve as grounds to spare her from making an ad hoc decision regarding complex constitutional issues.

Importantly, there is no harm by in treating a disqualified candidate as a last-place candidate in the event. By contrast, calling for a special election if President Trump is improperly withheld from a ballot will cause substantial difficulty and harm.

The Maine GOP primary is March 5, 2024. After the primary the delegates are pledged but not formally allocated until the convention which would be July 15, 2024 through July 18, 2024, and it is in the Secretary's best interest to allow President Trump to remain on the Republican primary ballot. If, and only if, the Supreme Court of the United States upholds the *Anderson* decision, then the Secretary of State may consider the applicability of Section Three.

Respectfully submitted the 21st of December 2023,

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**Certificate of Service**

I certify that on this 21st day of December 2023, the foregoing was electronically served via e-mail on all parties and their counsel of record:

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