STATE OF MAINE
DEPARTMENT OF THE SECRETARY OF STATE

In re: Challenge to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States

CHALLENGERS KIMBERLEY ROSEN, ETHAN STRIMLING, AND THOMAS SAVIELLO SUPPLEMENTAL BRIEF

Pursuant to the Secretary's December 20 order, challengers hereby submit the following brief addressing the impact of the Colorado Supreme Court's decision in *Anderson v. Griswold*, 2023 CO 63 (December 19, 2023) ("*Anderson*"). There, the court held that former President Trump is disqualified from holding the office of President under Section Three, and therefore ineligible to appear on the Colorado presidential primary ballot. Here, first: the Secretary should follow the well-reasoned opinion as the best modern persuasive authority on all pertinent legal issues; and second: she should hold that, as a matter of law, the doctrine of collateral estoppel requires her to follow the Colorado courts' factual determinations on all essential issues and, accordingly, remove Trump from the primary ballot.

I. The Colorado Supreme Court's decision in *Anderson v. Griswold* is the best persuasive authority on issues of law and the Secretary—relying on the same overwhelming evidentiary record reviewed by the Colorado courts—should reach the identical or substantially similar findings of fact and conclusions of law.

As noted in *Anderson*, the Colorado trial court permitted multiple intervenors to participate; allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged; issued three substantive rulings on these motions, all in

advance of the trial. The trial itself "took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. *Id.* ¶84. The documentary evidence was overwhelmingly evidence in the public domain which the parties—and indeed the entire country—had known about for over 2 years—photos and videos of Trump's speech on the Ellipse on January 6 and the subsequent attack on the Capitol, as well as Trump's own tweets and statements at rallies and news conferences, and the January 6 Report itself. "Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window [the statute] requires . . . ." *Id.* "And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense." *Id.* ¶ 85.

Here, where the facts, evidence, and legal arguments are almost or in fact identical to the extensive Colorado record, the Secretary should follow the holdings of the Colorado Supreme Court on all pertinent legal issues. Maine courts often rely on persuasive authority from highest courts in other states to resolve cases of first impression. *See e.g. Estate of Kennelly v. Mid Coast Hosp.*, 2020 ME 115, ¶¶ 31-32, 239 A.3d 604 ("consider[ing] the approaches of other states" on the redaction of medical records where "this is an issue of first impression in Maine. . . ."). The Law Court regularly cites her sister court in Colorado, including for its interpretations of provisions of the United States Constitution. See e.g. *State v. Weddle*, 2020 ME 12,

224 A.3d 1035 (on Fourth Amendment issue, citing *People v. Scott*, 227 P.3d 894, 898 (Colo. 2010)); *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 33 n.8, 871 A.2d 1208, 1220 n.8 (on First Amendment issue, citing *Moses v. Diocese of Colo.*, 863 P.2d 310, 314 (Colo. 1993)).

These holdings from *Anderson* that the Secretary should follow here include: (1) the Constitution empowers states to limit presidential primary ballot access based on qualifications, *Anderson*, 2023 CO 63 ¶¶ 50-56; (2) Congress does not need to enact enabling legislation to permit enforcement of Section 3, *id.* ¶¶ 88-107; (3) the political question doctrine does not render the case non-justiciable, *id.* ¶¶ 108-126; (4) Section 3 applies to President Trump because he served as an "officer of the United States," he swore an oath "to support the Constitution," and he is seeking to hold an "office … under the United States," *id.* ¶¶ 127-161; (5) the definition of "insurrection" includes any "concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country." *id.* ¶ 184); and (6) the term "'engaged in' requires 'an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.'" (*Id.* ¶ 194); and (7) Donald Trump's speech inciting the insurrection on January 6 was not protected by the First Amendment, *id.* ¶¶ 228-256.

More specifically, the Colorado Supreme Court properly held that "the U.S. Constitution authorize[s] states to assess the constitutional qualifications of presidential candidates." *Anderson*, 2023 CO 63, ¶ 51. The court recognized that

absent some other constitutional restraint, and acting on their authority under Article II, Section 1 of the U.S. Constitution, "states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President." *Id.* ¶ 53 (emphasis added). The Court held that Colorado had "exercised this power through the Election Code," enacting two provisions, CRS 1-4-1204(4) and CRS 1-1-113 which delegated the authority to adjudicate presidential primary candidate qualifications to Colorado state district courts. *Id.* ¶ 56. Maine has also exercised this power, enacting provisions that allow voters to challenge the qualifications of presidential primary candidates. *See* 21-A M.R.S. §§ 336, 337, 443, et al. However, whereas Colorado law empowers state courts to adjudicate these qualifications, Maine entrusts the Secretary of State the authority to make this decision based on the facts and law, pursuant to a robust challenge procedure under 21-A M.R.S. § 337. Furthermore, because there is no "textually demonstrable commitment to Congress . . . to assess presidential candidate qualifications" and because states do have such power, the Colorado Supreme Court properly held this is not a nonjusticiable political question. *Anderson*, 2023 CO 63, ¶ 112.

The Colorado Supreme Court also rejected Trump's primary evidentiary objection, which was raised in both Colorado and this proceeding, that the Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol ("the January 6 Report") is inadmissible under M.R.E. 803(8)(A)(iii) because of alleged bias in its creation and because it contains layered hearsay. In

rejecting the bias argument, the court not only credited the cross-examined testimony and evidence that the January 6 Report was not compromised by bias, but emphasized that Trump's generalized complaints about the "political backdrop" of the creation of January 6 Report would bar—contrary to the plain text of federal, Colorado, and Maine rules of evidence—the admission of any report by any legislature or political body. *Anderson,* 2023 CO 63, ¶¶ 165-70. Further, the court reiterated that none of the four factors for evaluating reliability from *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) and cited in *Barry v. Tr. of Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006) is dispositive, and there is no dispute over the strong indicia of reliability of the January 6 Report with regard to the other three factors. *Id.* ¶ 170. The court further dismantled Trump's layered hearsay argument, raised again here, noting that even if the admissibility of the January 6 Report does not itself resolve hearsay objections, only two of the thirty-one findings to which Trump objected potentially contained hearsay and, even if they did, the court's reliance on them was harmless. *Id.* ¶¶ 171-73.

The dissents in *Anderson* should not affect the outcome here. Two of the dissenting opinions in *Anderson* solely concerned Colorado law and thus are irrelevant here. And, critically, not one of the dissenting Justices cast any doubt on the Majority's central holding on the merits: that Trump engaged in an insurrection against the Constitution, in violation of his prior oath to support it, within the meaning of Section 3 of the Fourteenth Amendment.

Finally, both the *Anderson* majority and the Challengers' Closing Brief here thoroughly refute Justice Samour's assertions that Section 3 of the Fourteenth Amendment cannot be enforced through a state law cause of action, his reliance on Chief Justice Chase's non-binding opinion as a circuit judge in *In re Griffin*, and his due process concerns. See *Anderson*, 2023 CO 63, ¶¶ 79-85 (due process), 88-106 (Section 3 can be enforced through state law); Challengers' Closing Br. at 17-22.

Justice Samour also wrongly suggested that the criminal rebellion or insurrection statute, 18 U.S.C. § 2383, "enables enforcement" of Section 3. *See Anderson*, 2023 CO 63, ¶ 276 (Samour, J., dissenting). Despite some overlapping text, 18 U.S.C. § 2383 does not implement Section 3 of the Fourteenth Amendment and was not enacted under Section 5's enforcement authority. In fact, the criminal statute was originally codified in 1862, six years before the Fourteenth Amendment's ratification in 1868. *See* Second Confiscation Act, 12 Stat. 589 (July 17, 1862). Not surprisingly, then, Section 3 and Section 2383 differ materially in text, scope, and function. For example, Section 3 only applies to individuals who commit insurrection against the Constitution after taking an oath, whereas Section 2383 applies to individuals who commit insurrection against the United States no matter if they have taken an oath. And historically, none of the individuals disqualified under the Fourteenth Amendment since its ratification in 1868—not one—was charged under 18 U.S.C. § 2383 or its predecessor statutes. *See, e.g., New Mexico ex rel. White v. Griffin*, 2022 WL 4295619, *16 (N.M. Dist. Ct. Sep. 6, 2022); *Worthy v. Barrett*, 63 N.C. 199 (1869); *In re Tate*, 63 N.C. 308 (1869); *Louisiana ex*

rel. Sandlin v. Watkins, 21 La. Ann. 631 (1869); *see also* William Baude & Michael Stokes Paulsen, The Sweep and Force of Section Three, 172 U. Pa. L. Rev. (forthcoming 2024), at 81-82 & n.288, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 ("[A] prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three . . . ."). Not even Jefferson Davis was ever tried or convicted under Section 2383—or any other criminal statute, for that matter—but no one ever doubted his disqualification. *See* Challengers' Closing Br. at 27, 39; Graber Br., 19-20.

II. Even if the Secretary were not convinced by the mountain of unrebutted and publicly available evidence, collateral estoppel binds her factual determinations on essential issues.

Collateral estoppel, also known as issue preclusion, "prevents the relitigation [in a later proceeding] of factual issues already decided [in an earlier proceeding]." *Pacheco v. Libby O'Brien Kingsley & Champion, LLC*, 2022 ME 63, ¶ 7, 288 A.3d 398. For this doctrine to apply, the determination must be "essential to the [final] judgment of the previous court." *Id.*, ¶ 8 (citing Restatement (Second) of Judgments § 27 (Am. L. Inst. 1982)). It "can be applied to administrative proceedings as well as to court proceedings." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 9, 940 A.2d 1097. The Full Faith and Credit Clause of the United States Constitution requires Maine to apply its doctrine of collateral estoppel to the judgments of other state courts. U.S. Const. art. IV, § 1. For the purposes of collateral estoppel, a judgment is considered final notwithstanding the pendency of any appeal. *Mahmoud v. Jacques*, No. 2:14-cv-255-JHR, 2016 U.S. Dist. LEXIS 57082, at *28-29

(D. Me. Apr. 29, 2016) (citing *Bartlett v. Pullen*, 586 A.2d 1263, 1265 (Me. 1991) and Restatement (Second) of Judgments § 13 comment f).

Maine permits the offensive use of nonmutual collateral estoppel—where, as here, a plaintiff, or in this case challenger, who was not a party to the original proceeding seeks to apply the doctrine to estop a defendant—"on a case-by-case basis if it serves the interests of justice and . . . require[s] that the identical issue was determined by a prior final judgment, and that the party estopped had a fair opportunity and incentive to litigate the issue in the prior proceeding." *Van Houten v. Harco Constr.*, 655 A.2d 331, 333 (Me. 1995). "The party resisting collateral estoppel has the burden of demonstrating that it would be prejudiced by its application." *Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶ 18, 989 A.2d 733.

The analysis of whether a party would be prejudiced involves the same factors applied to determining whether a party has had a full and fair opportunity to litigate a claim, including:

> the size of the claim, the forum of the prior litigation, whether the issue was a factual or a legal one, the foreseeability of future suits, the extent of the previous litigation, the availability of new evidence, the experience of counsel, indications of a compromise verdict, [and] procedural opportunities available in the second suit that were unavailable in the first.

Id., ¶ 17.

"A finding is considered essential to the judgment when it relates to an ultimate fact or issue of law." *Pacheco*, 2022 ME 63, ¶ 9. Here, Trump is estopped from relitigating five essential issues decided by the Colorado Supreme Court: (1) "the events of January 6 constituted a concerted and public use of force or threat of

force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country." *Anderson*, ¶ 189. (2) "President Trump engaged in the January 6 insurrection by acting overtly and voluntarily with the intent of aiding or furthering the insurrectionists' common unlawful purpose." *Id.* ¶ 196. (3) "President Trump incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power." *Id.* ¶ 243. (4) "President Trump intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power." *Id.* ¶ 249. Finally, (5) "President Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence." *Id.* ¶ 255.

Here, the interests of justice weigh heavily towards applying collateral estoppel to resolve the shared essential fact issues. This holds especially true given that the Colorado case was litigated in a five day trial in district court—rather than an administrative hearing—by the exact same counsel with the exact same evidence and given that, as the Colorado Supreme Court recognized, Trump's arguments throughout both cases "have focused predominantly on questions of law and not on disputed issues of material fact." *Anderson*, 2023 CO 63, ¶ 82.

III. Conclusion

For the foregoing reasons, and those contained in Challengers' previous briefs, the Secretary should refuse to list Donald Trump on the presidential primary ballot based on his constitutional ineligibility to assume the office of the Presidency.

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/s/ Benjamin Gaines
Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 1023
Brunswick, ME 04011
207-387-0820
ben@gaines-law.com

/s/ James T. Kilbreth
James T. Kilbreth
Maine Bar No. 2891
84 Marginal Way, Suite 600
Portland, ME 04101
207-939-8585
jamie.kilbreth@gmail.com

Counsel for Challengers Kimberley Rosen, Thomas Saviello, and Ethan Strimling