STATE OF MAINE
SECRETARY OF STATE

In re: Challenges of Nathan Berger, Anne Gass, and Sandra Marquis to Nomination of Slate of Presidential Electors to Support Dr. Cornell West	**Challengers Anne Gass and Sandra Marquis's Briefing on Prehearing Issues**

Challengers Anne Gass and Sandra Marquis (the "Challengers") submit the following briefing to the Secretary of State in connection with two issues following this morning's prehearing conference: (1) whether the unsworn declarations proposed by Challengers Gass and Marquis as evidence are admissible under 5 M.R.S.A. § 9057(5), and (2) whether 21-A M.R.S.A. § 196-A permits use of the confidential data in the central voter registration system as hearing evidence. Additionally, the Challengers submit the following legal briefing related to instances of fraud they intend to prove at the hearing, a submission that is intended to inform the Secretary's analysis of that testimony and establish the need to invalidate the petition altogether due to the fraud of its circulators.

1. Declarations signed under penalty of perjury should be admitted into evidence.

Nothing in Maine's Administrative Procedure Act ("MAPA") requires a notarized affidavit instead of a declaration signed under penalty of perjury. To the contrary, the relevant provision of the MAPA provides that "[n]o sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown." 5 M.R.S. § 9057(5). The Secretary of State has framed the question at issue as whether unsworn declarations may be admitted, but a declaration signed under penalty of perjury is sworn written evidence to the same extent as an affidavit. Because declarations are permitted by the plain language of the statute and the Legislature's choice to use "sworn written evidence" rather than limiting it to "affidavit," declarations signed under penalty of perjury must be allowed.

Affidavits and declarations signed under penalty of perjury both meet the standard for admissible evidence in the MAPA, which is that "[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." 5 M.R.S. § 9057(2). Declarations signed under penalty of perjury are of course regularly admitted in federal litigation, and it is likewise reasonable to expect them in this proceeding.

Declarations signed under penalty of perjury are also accepted by state courts in Maine. For example, the Law Court recently reasoned that although a motion was not accompanied by any affidavits, declarations signed under penalty of perjury "are equivalent to affidavits filed in Maine courts." *Franchini v. Investor's Bus. Daily, Inc.*, 2022 ME 12, ¶ 7, n.5, 268 A.3d 863. And Maine Superior Courts have also regularly found declarations signed under penalty of perjury to be acceptable. *See, e.g., Diggins v. Jeld-Wen Inc.*, No. CV-19-167, 2021 WL 3651828, at *1 (Me. Super. Mar. 05, 2021) ("Although affidavits *and declarations under penalty of perjury may be accepted as evidence* for purposes of Rule 56, statements that are not made under oath or under penalty of perjury do not qualify.") (emphasis added); *Mank v. MSAD 15*, No. CV-14-320, 2015 WL 6086154, at *2 n.2 (Me. Super. Sep. 24, 2015) ("Mank signed a declaration that his answers to interrogatories were 'under penalty of perjury,' *which the court finds sufficient* under 28 U.S.C. § 1746.") (emphasis added). *Cf. Mazerolle v. Daimlerchrysler Corp.*, No. CV-01-581, 2005 WL 6964922, at *6 n.5 (Me. Super. May 24, 2005) (declarations found not to be sufficient where they were unsworn and did not state that they were submitted under penalty of perjury). So long as declarations are signed under penalty of perjury, Maine courts have allowed them. They should be allowed here, too.

The authors of the declarations that challengers seek to use at the hearing are registered Maine voters who have just learned, in the past week (and in some instances just today), that petitions they signed were not what they purported to be. They are being asked—under extremely tight deadlines—to become involved in a legal proceeding in which they have no stake. Under these circumstances, it may not always be possible to obtain an affidavit signed in front of a notary.[1] In many cases, if necessary, the lawyer who obtained these declarations could be available to testify at the hearing. But where the authors of the declarations have signed under penalty of perjury and are available to be cross examined or to be subpoenaed, the declarations that challengers intend to submit are the kind of evidence that has been regularly accepted by Maine courts and that is sufficiently reliable to be accepted here.

[1] A few of the voters who are willing to submit sworn written testimony were unable to physically sign at all, affidavit or otherwise, because they are currently on a boat off the coast of Maine. These voters have executed declarations via Docusign which are included among Challengers' exhibits. This sworn written testimony should also be accepted given the extraordinarily tight timeline here and the fact that executing documents via Docusign has become commonplace in, for example, real estate and corporate transactions and is one method of personally signing things "which reasonable persons are accustomed to rely in the conduct of serious affairs." *See* 5 M.R.S. § 9057(2).

For these reasons, we respectfully request that declarations signed under penalty of perjury be allowed (by all parties) at the hearing in this matter.

2. Central voter registration system data relied on by the Secretary should be part of the record.

The Secretary has asked for briefing on whether 21-A M.R.S. § 196-A permits use of confidential data in the central voter registration system as hearing evidence. The answer to this question must be yes, because a central question in this challenge is whether the people who signed Dr. West's petition are Maine voters.

The Challengers intend to offer evidence that many of the signatures on Dr. West's petition are from people not registered to vote in Maine. This evidence will be based on a review of the voter database maintained by the Democratic Party, a database populated directly from Maine's central voter registration system. *See* 21-A M.R.S. § 196-A (allowing a political party to purchase information from the central voter registration system). Witness testimony at the hearing will explain more about this voter database, how it is populated, and that it is a reliable indicator of who is—and, importantly, who is not—registered to vote in Maine. The Challengers will not offer evidence directly from Maine's central voter registration system for the simple reason that they don't have access to the system itself.

Following the close of this evidence, we understand that the Secretary may wish to consult Maine's database directly to confirm that many of the names on Dr. West's petition are not registered voters. If the Secretary does rely on any portion of the state database, then the MAPA requires that at least that portion of the database be included in the record and made available to the parties. *See* 5 M.R.S. § 9059(4) ("All material . . . in the possession of the agency, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record"). This is true even if the Secretary decides that information in the database must remain confidential to the public generally. *See id.* § 9059(3) (allowing the agency to "withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by state or federal statute" but only "in the least restrictive manner feasible").

Though the Secretary must include any information she relies on from the state's central voter registration system in the record, the Challengers have no objection to a protective order to ensure this information is only available to the parties to this proceeding.

3. The petition should be invalidated because of fraud.

The Challengers will present evidence at the hearing that Dr. West's circulators were convincing Maine voters to sign Dr. West's petition through fraud, by concealing the fact that the petition had anything to do with him and instead making up an entirely different, and false, purpose for it. Because his circulators were using fraud to collect signatures, the Secretary of State should reject Dr. West's petition as a whole and deny his place on the November ballot.

The Secretary of State has the power under Title 21-A to invalidate an entire petition when there is proof of fraud or knowingly false statements by its circulators. This is consistent with "the fact," as acknowledged by Maine's Superior Court, "that the presence of fraud will invalidate petitions wholesale." *Knutson v. Dep't of Sec'y of State*, 2008 ME 124, ¶ 25, 954 A.2d 1054 ("Certainly courts and election administrators have been firm in voiding petitions where fraud is present"). While Title 21-A does say that only individual voter lines, as opposed to petitions, can be invalidated when "there is no proof of fraud or a knowingly false statement by a circulator" (21-A M.R.S. § 354(9)), it has no such limitation when a challenger does prove that a circulator committed fraud or made knowingly false statements. In these unfortunate cases, "to protect the integrity and reliability of the electoral process itself" the entire petition should be invalidated. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

Invalidating an entire petition because a challenger has proven instances of fraud is the most appropriate remedy considering the tight timeline in the challenge process. Dr. West's petitions were not available to potential challengers until July 31, with the deadline for any challenges a week later on August 8. While this short period of time is a significant impediment for the Challengers to discover every instance of fraud and every occasion a circulator lied to each of the more-than-4,000 voters who signed the petition in this short window, the Secretary of State must still take appropriate action when presented with evidence of numerous instances of fraud and other deceptive practices. *See, e.g., Montanans for Just. v. State ex re. McGrath*, 2006 MT 277, ¶¶ 79-82 ("As it was impossible to precisely identify which certified signatures were untainted by Proponent's signature gatherers' various deceptive practices, the District Court invalidated all signatures gathered by all of Proponents' out-of-state paid workers"). Once the Challengers prove the existence of such fraud, something they intend to do at the upcoming hearing, Dr. West's petition as a whole should be invalidated.

If Maine does ultimately decide to deny Dr. West access to its general election ballot because his circulators were defrauding voters, it will not be the only state to do so. In July, after a longer investigation than Maine's challenge process allows, the North Carolina Board of Elections voted not to recognize Dr. West's party or allow him a place on November's ballot. It made this call because it "had no confidence" that his signature

gathering "was done legitimately." *See* North Carolina Board of Elections Meeting at 30:30 to 37:30 (July 16, 2024).[2] It is likewise impossible to know how many of the signatures submitted by Dr. West in Maine are tainted by his circulators' fraud and so Maine should also refuse his place on the November ballot.

At the close of evidence in this challenge, after the Secretary has received proof that multiple voters were defrauded by Dr. West's circulators, she should protect the integrity of Maine's election process and decide that his slate of electors cannot appear on the ballot in November.

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Daniel Walker, Maine Bar No. 8519
Matthew Warner, Maine Bar No. 4823
Alexandra Harriman, Maine Bar No. 6172
Attorneys for Challengers Anne Gass and Sandra Marquis

Preti Flaherty Beliveau & Pachios LLP

PO Box 1058, 45 Memorial Circle
Augusta, ME 04332-1058
207-623-5300
dwalker@preti.com
mwarner@preti.com
aharriman@preti.com

[2] Available online at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/State%20Board%20of%20Elections%20Meeting-2024-40716.mp4. A court challenge to this decision is ongoing.