STATE OF MAINE		SUPREME JUDICIAL COURT Sitting as the Law Court Docket No. Ken-24-24
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DONALD J. TRUMP,	)	MEMORANDUM OF
	)	CHALLENGERS ROSEN,
	)	SAVIELLO AND STRIMLING
v.	)	SHOWING CAUSE WHY
	)	THE APPEAL SHOULD NOT
SECRETARY OF STATE, et al.	)	BE DISMISSED AS
	)	INTERLOCUTORY
	)	

INTRODUCTION

Pursuant to the Court's Order dated January 19, Parties-in-Interest/Appellants Kimberley Rosen, Thomas Saviello, and Ethan Strimling (the "Challengers") submit this memorandum showing cause why the appeal should not be dismissed as interlocutory. The Court should not dismiss this appeal for three reasons: *first*, because it is specifically authorized by statute; *second*, because the judicial economy exception to the final judgment rule provides for prompt appellate review to prevent judicial interference with legitimate executive department activity; and *third* because Challengers' rights to appellate review may be irreparably lost if it is not. Finally, and relatedly, due to the truly unique circumstances of this case—the same reasons for which the Superior Court erroneously ordered remand—the Court should modify the deadlines contained in 21-A M.R.S. § 337(2)(E) to preserve judicial economy and avoid unnecessary voter confusion.

BACKGROUND

On December 8, 2023, Challengers filed a timely challenge in the office of the Secretary of State to the Republican presidential primary petitions of Donald J. Trump, pursuant to 21-A M.R.S. § 337(2)(A)

(2023). Challengers alleged that because Mr. Trump engaged in insurrection against the Constitution of the United States, he does not "meet[] the qualifications of the office [he] seeks" and is therefore ineligible to compete in Maine's Republican presidential primary election scheduled for March 5, 2024. On December 15, 2023, after due notice to the candidate, the Secretary of State held a consolidated hearing concurrently with two other challenges filed against the same candidate. The hearing was continued by the Secretary for the limited purpose of receiving and ruling upon evidentiary objections over the following days. After briefing, the Secretary issued her decision on December 28, 2023, determining that Mr. Trump was disqualified from appearing on Maine's ballot, but stayed that decision to allow for appellate review.

On January 2, Mr. Trump filed a timely appeal in Superior Court. *See* 21-A M.R.S. § 337(2)(D). Following three days of scheduling conferences, the Superior Court (Kennebec County, *Murphy*, J.) issued a procedural order on January 5. Later on January 5, the United States Supreme Court granted certiorari in *Trump v. Anderson*, No. 23-719

(U.S. Jan. 5, 2024)[1], a similar case involving Mr. Trump's eligibility to appear on Colorado's Republican presidential primary ballot—also scheduled for March 5—setting an expedited briefing schedule and oral arguments to be held February 8. On the morning of January 6, the Superior Court asked the parties to confer on whether to stay the proceedings pending resolution of the Colorado matter, and inviting a motion to that effect should the parties fail to reach an agreement. Mr. Trump moved to stay the proceedings on January 7, with the Secretary and Challengers each filing opposition. After receiving briefing on the merits of the appeal from all parties, the Superior Court issued a decision on January 17—the deadline provided under 21-A M.R.S. § 337(2)(D): 20 days after the date of the decision of the Secretary of State—denying the stay, but remanding the matter to the Secretary "to await the Supreme Court's decision in *Anderson*, and no later than thirty days after *Anderson's* issuance, to issue a new Ruling modifying, withdrawing, or confirming her prior Ruling dated December 28, 2023."

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[1] *See* Docket No. 23-819, Entry of Jan. 5, 2024, https://www.supremecourt.gov/docket/docketfiles/html/public/23-719.html.

Order and Decision 17.

On January 19, the Secretary timely filed notice of appeal, and on January 22, Challengers did likewise. *See* 21-A M.R.S. §337(2)(E).

ARGUMENT

I. This appeal should not be dismissed, because by statute the Superior Court's "decision" may be appealed.

In most cases, the Law Court will dismiss as interlocutory "an appeal of a remand from the Superior Court to an executive agency for additional decision-making" because it "is not a final judgment." *Est. of Pirozzolo v. Dep't of Marine Res.,* 2017 ME 147, ¶ 5, 167 A.3d 552. However, as the final judgment rule is not jurisdictional, but rather "a long-standing prudential rule ... intended to avoid piecemeal appeals and to promote the efficient and effective resolution of legal disputes," *id.* (*citing Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 16, 39 A.3d 74), the Court acknowledges several exceptions. For instance, the Court will "entertain appeals from orders otherwise not sufficiently final where the Legislature has enacted a specific statutory authorization for such an appeal." *Maine Cent. R.R. v. Bangor Aroostook R.R.*, 395 A.2d 1107, 1113 (Me. 1978). Here, 21-A

M.R.S. § 337(2)(E) (2023) contains specific statutory authorization for this appeal.

Section 337(2)(E) provides that "[a]ny aggrieved party may appeal the *decision* of the Superior Court, on questions of law, by filing a notice of appeal within 3 days of that decision." *Id.* (emphasis added). Here, the Superior Court expressly noted in its Order and *Decision* (emphasis added), that its remand "constitutes a decision under Section 337" for the purpose of satisfying the twenty-day deadline contained in 21-A M.R.S. § 337(2)(D). Order and Decision 12-13. Appeal is therefore specifically authorized for any party aggrieved by the remand. Here, the Challengers are aggrieved because the Superior Court's order that the Secretary must "await the Supreme Court's decision in *Anderson,*" and then issue a new Ruling within *thirty days* following that decision nullifies the expedited appellate review guaranteed by statute, and, depending on the Secretary's course of action, may leave Challengers with no appellate remedies at all.

To understand why Challengers are aggrieved by the remand, it is necessary for the Court to consider the likely consequences of the remand for *this case* if Challengers' counterparts in the Colorado case

prevail in front of the Supreme Court. While the Superior Court is correct that the U.S. Supreme Court will probably resolve many of the important legal questions that Mr. Trump has raised in his appeal, *see* Order and Decision 13, if those legal issues are resolved in Challengers' favor this case will likely[2] still be left with several important issues, namely:

(1) Whether the Secretary was authorized by statute to inquire whether Mr. Trump was disqualified from holding the office of President, and then to invalidate his petitions upon a conclusion that he did not "meet[] the qualifications" of that office;

(2) Whether there was substantial evidence in the record to support the Secretary's findings; and

(3) Whether the proceedings before the Secretary were conducted in an impartial manner and whether the Secretary ought to have disqualified herself.

Significantly, the Court's well-established precedent requires that each of these questions must be answered *before* the questions of federal constitutional law which might be resolved by the U.S. Supreme Court.

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[2] This expectation reflects a general consensus among federal election law experts that States *may* but are not *required* to exclude ineligible candidates from the ballot. *See e.g.* Brief of Professor Derek Mueller, *Trump v. Anderson*, No. 23-719, https://www.supremecourt.gov/DocketPDF/23/23-719/298021/20240118122740839_23-719%20Amicus%20Brief.pdf; Brief of Edward B. Foley, Benjamin L. Ginsberg, and Richard Hasen at 5, *Trump v. Anderson*, No. 23-719, https://www.supremecourt.gov/DocketPDF/23/23-719/297014/20240118112848137_23-719.Amicus.Foley.Ginsberg.Hasen.pdf.

See e.g. In re Child of Rebecca R., 2019 ME 165, ¶ 6, 221 A.3d 540 ("Before we reach directly any constitutional issue, prudent appellate review requires that we first determine whether the issue may be resolved on a basis that does not implicate the constitution.") But presuming that the Supreme Court decides *Anderson* before the March 5 Colorado and Maine primaries, the Secretary, Challengers, and Maine's courts would face a mad dash—likely to confuse voters—to resolve these state law questions before election day. Indeed, if the Secretary were to determine that she needed a full thirty days to consider and implement the Supreme Court's decision in *Anderson*, Challengers would have no avenue to remove Trump from the ballot prior to the election, and no opportunity to appeal the Secretary's failure to act until she actually issued a new ruling.

Challengers' decision not to object to an extension to the stay of the Secretary's decision reflected a strategic choice to litigate the merits of this case on the expedited but orderly timeline provided by statute rather than to expend time and energy litigating the stay on an uncertain timeline. But the Superior Court's decision to order remand would upend that choice and force the Challengers into chaotic and

confusing litigation in the final days before the March 5 primary. Challengers were aggrieved by that decision, and accordingly appealed.

II. This appeal should not be dismissed because it meets the judicial economy exception to the final judgment rule.

The judicial economy exception to the final judgment rule against hearing interlocutory appeals provides for adjudication where the "denial of appellate review could result in judicial interference with apparently legitimate executive department activity and therefore appellate review is necessary to safe-guard the separation of powers." *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36 ¶ 18, 39 A.3d 74 (cleaned up); *see also Fox Islands Wind Neighbors v. Dep't of Envtl. Prot.,* 2015 ME 53, ¶ 9 (quoting same). This exception applies, "when prompt appellate review is required to prevent judicial interference with apparently legitimate executive department activity and thereby safeguard the separation of powers, and in order to avoid undue [judicial] disruption of administrative process." *Id.* Here, in 21-A M.R.S. § 337, the legislature deliberately provided an expedited course of proceedings to ensure the resolution of questions of candidate eligibility in advance of the oncoming primary election.

While the parties have agreed to stay the Secretary's decision

pending expedited consideration of a parallel Colorado case by the United States Supreme Court, a remand back to the Secretary at this stage would mean potentially restarting the timeline contained in section 337 in late February, and again winding through the Superior Court before the Law Court could resolve state law issues at the last minute. Given the opportunity to resolve these questions immediately, that would constitute an "undue judicial disruption of administrative process," which should especially be avoided immediately before an election. Under these circumstances, the Law Court should hear at least the state law questions now, rather than later.

III. This appeal should not be dismissed because it also meets the final judgment rule's death knell exception.

The Court will also hear interlocutory appeals "where substantial rights of a party will be irreparably lost if review is delayed until final judgment." *Bruesewitz v. Grant*, 2007 ME 13, ¶ 8, 912 A.2d 1255. Here, as explained above, because the terms of the remand order permit the Secretary up to thirty days to issue a new decision—well in excess of the length of any of the deadlines contained in section 337—Challengers risk the irreparable loss of their rights if review is delayed. To reiterate: in this case, Challengers seek to disqualify Mr. Trump from the March

5 primary ballot. Section 337 provides a timeline that allows for final resolution in advance of that date. The U.S. Supreme Court has taken up the parallel Colorado matter in expedited fashion, with oral argument scheduled for February 8, and appears likely to resolve that litigation before Colorado's March 5 primary. Yet, even if it does so, the Superior Court's order does not require the Secretary to act for thirty days—until *after* the primary has passed. Should the Secretary for whatever reason be unable to make a decision immediately after the Supreme Court issues its decision, Challengers would be unable to obtain timely judicial review and their interests would suffer irreparable harm.

IV. Under these unique circumstances, the Court should modify the schedule set forth in 21-A M.R.S. § 337(2)(E) to preserve judicial economy and to avoid confusing the electorate, but without doing harm to its purpose.

Notwithstanding the deadlines contained in section 337(2)(E) and all of the forgoing arguments, the Superior Court was not wrong to suggest that the agreed-upon stay presents an opportunity to preserve judicial economy and avoid confusing the electorate, provided that the Law Court resolves the state law issues now and maintains jurisdiction until the case can be fully resolved. Because the Superior Court's time

allotted for review under section 337(2)(D) has now passed, the Court should not remand to the Superior Court, but—as it does with all 80C cases—review the Secretary's Ruling directly. *See Reed v. Sec'y of State*, 200 ME 57, ¶ 12, 232 A.3d 202.

Under these circumstances, there is no reason not to authorize a modest extension of the briefing deadlines to allow more focused argument from the parties on the the state law issues identified above, for example by two days until Monday, January 29. Assuming the Court adjusts the timeline for its decision by a similar two day amount, it would then be in a position to issue a decision on the state law issues in a timeframe consistent with the statute's purpose of avoiding electoral confusion. The Court could then, consistent with the principles of judicial economy, issue its decision on the remaining constitutional issues immediately after the U.S. Supreme Court rules in *Anderson*, prior to the primary election.

CONCLUSION

For the forgoing reasons, the appeal should not be dismissed.

Dated at Brunswick, Maine this January 23, 2024.

/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

Certificate of Service

I, Benjamin Gaines, hereby certify that a copy of this memorandum was electronically served upon all counsel of record for the parties in this matter.

Dated: January 23, 2024

/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

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