STATE OF MAINE		SUPREME JUDICIAL COURT Sitting as the Law Court Docket No. Ken-24-24
DONALD J. TRUMP, v. SECRETARY OF STATE, et al.	))))))))))	MEMORANDUM OF SECRETARY OF STATE SHENNA BELLOWS AS TO PERMISSIBILITY OF APPEAL

Pursuant to this Court's January 19, 2024 Order to Show Cause, Respondent-Appellant Secretary of State Shenna Bellows submits this memorandum to describe why her appeal should not be dismissed. There are two reasons why the prudential rule against consideration of interlocutory appeals does not bar the Secretary's appeal in this case. *First*, the Secretary's appeal is expressly authorized by 21-A M.R.S. § 337(2)(E). *Second*, two exceptions to the final judgment rule apply: the "death-knell" exception and the "judicial economy" exception.

I. Section 337(2)(E) expressly authorizes this appeal.

This proceeding has, since its inception, been governed by the timeline set forth by the Maine Legislature in Title 21-A, Section 337. That statute

identifies a series of mandatory deadlines—for parties, the Secretary, and the courts—that dictate the cadence of challenges to primary petitions. *See* 21-A M.R.S. § 7 (providing that "shall" and "must" in election statutes are "used in a mandatory sense to impose an obligation to act in the manner specified").

Consistent with these mandatory deadlines, because the Secretary issued her Ruling on December 28, 2023, the Superior Court was required to issue its decision by January 17, 2024. *See* 21-A M.R.S. § 337(2)(D). While the Secretary maintains that the remand ordered by the Superior Court in this matter is contrary to Section 337(2)(D), the Superior Court nonetheless made clear that it intended its "Order and Decision" of January 17 to be the "decision" required by Section 337(2)(D) (*see* Order and Decision at 13 ("[T]he Court's finding that a remand is necessary constitutes a decision under Section 337 . . . .")).

Section 337(2)(E), in turn, permits "[a]ny aggrieved party [to] appeal the decision of the Superior Court, on questions of law, by filing a notice of appeal within 3 days of that decision." That is precisely what has happened here. The Secretary filed an appeal from the Superior Court's Section 337(2)(D) decision within 3 days, and she is an aggrieved party because, as discussed in more detail below, the Superior Court's remand undermines the

Secretary's ability to facilitate an equitable and orderly primary election on March 5, 2024. *See Alliance for Retired Americans v. Sec'y of State*, 2020 ME 123 ¶¶ 19-20, 240 A.3d 45 (describing Secretary's interest in election administration, election integrity, and maintaining voter confidence). This appeal should accordingly be permitted. *Cf. Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 7, 897 A.2d 803 (permitting interlocutory appeal because it was authorized by statute).

Allowing an immediate appeal from the remand issued here makes practical sense, too. Section 337 is designed to produce an expedited resolution of challenges to primary petitions because of looming state and federal election deadlines. Primary petitions for presidential candidates, for example, must be delivered to the Secretary of State by December 1, 21-A M.R.S. § 442, and challenges to such petitions are due five business days later, 21-A M.R.S § 337(2)(A). Those timeframes leave little time for litigation; the challenge deadline is less than two months before ballots must be sent to uniformed and overseas voters, *see* 52 U.S.C. § 20302(a)(8); approximately two months before absentee ballots must be provided to municipal officials for use by voters in Maine, 21-A M.R.S. § 752; and three months before the primary election.

Accordingly, in addition to accelerating the Secretary's initial consideration of these challenges, Section 337 sets an upper limit on the duration of the judicial appeals process. Specifically, the Superior Court and this Court are collectively limited to 34 days to review the Secretary's Ruling and issue their decisions. *See* 21-A M.R.S. § 337(2)(D) ("The court shall issue a written decision containing its findings of fact and conclusions of law and setting forth the reasons for its decision within 20 days of the date of the decision of the Secretary of State."); *id.* § 337(2)(E) ("The court shall issue its decision within 14 days of the date of the decision of the Superior Court.").

Remands that do not permit final Superior Court resolution of a ballot challenge prior to the 20-day statutory deadline undermine this carefully constructed timeline. The Superior Court here, for example, remanded the case on the deadline for its decision with instructions that the Secretary wait for the Supreme Court of the United States to rule in *Trump v. Anderson*, No. 23-719, 2024 WL 61814 (U.S. Jan. 5, 2024), and then consider whether to confirm, modify, or withdraw her December 28, 2023 Ruling. Oral argument in *Anderson* is scheduled for February 8, 2024.[1] Therefore, even if the Supreme Court issues a decision in *Anderson* within a few days of oral

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

argument, if that decision does not direct an outcome in this case—and it may not[2]—the Superior Court's remand will result in an almost complete restart of the Section 337 process in mid-February at the earliest, more than two months after the challenges in this case were filed and just days before the March 5 primary election to which those challenges pertain.

Such an outcome is contrary to the statutory design and would sow public confusion. The Supreme Court's *Anderson* decision may well trigger a resumption of the Section 337 process in Maine just a few days before the March 5, 2024 primary, leaving voters to cast ballots not knowing whether a vote for Mr. Trump will count. Immediate appeal of the Superior Court's remand order is thus necessary to effectuate the purposes served by Section 337. *Cf. Schelling v. Lindell*, 2008 ME 59, ¶ 8, 942 A.2d 1226 (permitting interlocutory appeals from denials of special motions to dismiss brought

[2] The only resolution of *Anderson* that would conclusively determine this case is a reversal of the Colorado Supreme Court on a ground that contradicts a necessary basis for the Secretary's Ruling. If the Supreme Court of the United States affirms the Colorado Supreme Court, Maine's courts would still need to address Mr. Trump's state-law arguments. And even if the Supreme Court reverses, it could rule on only a Colorado-specific question, e.g., that the Colorado courts ran afoul of the Electors Clause of the U.S. Constitution, U.S. Const. art. II, § 1, cl. 2, by not adhering to the timeframes set forth in Colorado statute. Or the Supreme Court could dismiss the writ of certiorari as improvidently granted.

pursuant to anti-SLAPP statute because, among other reasons, failure to review would defeat the purpose of the statute).[3]

II. The "Death-Knell" and "Judicial Economy" exceptions apply.

Beyond express statutory authorization, an interlocutory appeal is also permissible in this case under two exceptions to the final judgment rule: the "death knell" exception and the judicial economy exception.

A. Death Knell

The "death knell" exception to the final judgment rule "justifies consideration of issues raised on an interlocutory appeal only if awaiting a final judgment will cause substantial rights of a party to be irreparably lost." *Salerno v. Spectrum Med. Grp., P.A.*, 2019 ME 139, ¶ 8, 215 A.3d 804 (quotation marks omitted). "A right is irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation." *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 14, 974 A.2d 918 (quotation marks omitted). The "injury to the appellant's claimed right, absent appeal, [must] be imminent, concrete and irreparable." *Id.* ¶ 16 (quotation marks omitted).

[3] As noted below, the Secretary's position is that the Superior Court's opportunity under Section 337(2)(D) to issue a merits decision has passed. The Secretary therefore does not intend to seek a remand back to the Superior Court, but rather will ask this Court to vacate the Superior Court's remand and affirm the Secretary's Ruling on its merits.

The proximity of the March 5, 2024 primary election illustrates why the "death knell" exception applies here. The Superior Court has sent the case back to the Secretary and ordered her to await a judgment from the Supreme Court in *Anderson*, which is not likely to be issued until at least several days after oral argument on February 8, 2024. In that instance, if the Supreme Court's decision in *Anderson* does not direct an outcome in this case, it will leave, at most, only a few weeks for the Secretary to reconsider her Ruling and for appellate review of that reconsidered Ruling. This is a far more condensed timeline than that contemplated by Section 337.

As a result, a potential consequence of waiting for the Supreme Court to rule in *Anderson* is that the Section 337 process will extend beyond election day, a possibility that the Superior Court appears to recognize (*see* Order and Decision 16 n.5). If that comes to pass, not only will voters have to cast their ballots without certainty as to whether a vote for Mr. Trump will be counted, but also the Secretary will be in the untenable position of determining how to tabulate election returns where one candidate's qualification remains in doubt, *see* 21-A M.R.S. § 722, a circumstance unaddressed by Title 21-A.[4]

[4] Title 21-A, Section 371 provides a procedure for managing the disqualification of a candidate in the run up to a primary election. But it offers no guidance on how the Secretary should act if a candidate's qualification is pending as of election day, or if a candidate is disqualified thereafter.

Indeed, election clerks must begin counting ballots as soon as the polls close on March 5, *see* 21-A M.R.S. § 695, and ranked-choice counting, if necessary, occurs soon thereafter.

That said, even if the Supreme Court decides *Anderson* in February, and the Secretary and the courts are able to deliver a final decision before election day, the ability of the Secretary to administer an equitable and orderly election will be substantially undermined. If Mr. Trump is ultimately disqualified, there will be little time to notify voters, consistent with 21-A M.R.S. § 371, that votes for a leading candidate will not count, and many absentee voters—be they overseas or in Maine—will have already cast their ballots.

In short, because the Superior Court's remand order may delay a final resolution of this case until near—or after—election day, an immediate appeal is necessary to prevent imminent harm not only to voters, but to the Secretary's ability to administer the primary election on March 5. *Cf. Alliance for Retired Americans*, 2020 ME 123, ¶¶ 5-6, 240 A.3d 45 (applying death knell exception due to "the impending election and corresponding deadline for the receipt of absentee ballots.").

B. Judicial Economy

The judicial economy exception "permits an interlocutory appeal when (1) review of a non-final order can establish a final, or practically final, disposition of the entire litigation, and (2) the interests of justice require that immediate review be undertaken." *Quirion v. Veilleux*, 2013 ME 50, ¶ 9, 65 A.3d 1287 (quotation marks omitted). As to the first requirement, a party need only demonstrate that, in at least one alternative, the Court's ruling would dispose of the entire litigation. *See Maples v. Compass Harbor Village Condominium Assoc.*, 2022 ME 26, ¶ 17, n.9, 273 A.3d 358.

Here, review of the Superior Court's Order and Decision can and should result in final disposition of the case. Review before this Court is the last step in the Section 337 process. The Superior Court has had its opportunity to issue a decision. If this Court decides to hear her appeal, the Secretary intends to urge the Court to vacate the remand and, as required by Section 337(2)(E), issue a decision on the merits of (and affirm) the Secretary's Ruling by January 31, 2024.[5]

[5] The lack of a merits decision from the Superior Court does not prohibit this Court from reviewing the Secretary's Ruling directly, as is the usual course in Rule 80C proceedings. *See Stein v. Me. Criminal Justice Acad.*, 2014 ME 82, ¶ 11, 95 A.3d 612.

The interests of justice likewise require immediate review. Time is of the essence, and permitting the Superior Court's remand to stand as the March 5 primary election approaches threatens substantial harm to its integrity, and to voters who are currently casting ballots. Finality in this case, at the earliest possible moment, is essential to promoting voter confidence and ensuring that the Secretary can administer the election—and tabulate its results—in an orderly fashion. Even if the Supreme Court decides *Anderson* in a way that directs the outcome in this case, seeing the Section 337 process to its conclusion consistent with that statute's timeline ensures that the question of Mr. Trump's qualification for the primary ballot in Maine will be settled, at the latest, concurrently—or nearly so—with the decision in *Anderson*, rather than weeks later.

CONCLUSION

For the reasons stated above, the Secretary's appeal should not be dismissed, and this Court should proceed to a consideration of the merits pursuant to Section 337(2)(E).

Dated: January 23, 2024

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CERTIFICATE OF SERVICE

I, Jason Anton, Assistant Attorney General, hereby certify that I have caused a copy of this Memorandum of Secretary of State Bellows as to Permissibility of Appeal to be served on all counsel of record via electronic mail.

Dated: January 23, 2024

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