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 RESPONSE TO TRUMP'S EVIDENTIARY OBJECTIONS

None of the objections in *Donald J. Trump's Evidentiary Objections* (the "Objections") has merit and each should be denied. They are a combination of misstatements of applicable law, process complaints created by Trump himself, unsupported factual assertions, and under-developed and generalized objections to virtually all of the Challengers' evidence.

I. Trump's Procedural Arguments are Wrong and Contrary to Law.

Trump's claims that the Secretary cannot hear the evidence in this case are contrary to Maine law and depend on willful ignorance of Trump's involvement in similar litigations.

A. The Secretary Can Consider Evidence.

Trump's attempt to prevent the Secretary from considering any evidence that he engaged in an insurrection against the United States Constitution on January 6 is contrary to Maine law. He wrongly asserts, without any legal support, that the Secretary is permitted only to inquire about accuracy of his sworn statements regarding qualifications specifically on his declaration. But the inclusion of only a partial list of qualifications for the presidency on that form cannot eliminate the requirement that a candidate meet all the qualifications for office and the issue here is whether Trump is disabled from running by virtue of the 14th Amendment. Moreover, Trump utterly fails to explain why the Maine evidentiary standard that the "kind of evidence upon which

reasonable persons are accustomed to rely in the conduct of serious affairs" should not apply, and the Secretary should instead improperly adopt and apply the inapplicable Rules of Evidence to avoid even considering evidence that Trump engaged in an insurrection before allowing Trump to appear on the ballot.

B. Trump Received Sufficient Due Process.

Trump likewise complains that the timing and form of the hearing and the amount of evidence against him deprived him of due process. This is untrue. As an initial matter, Trump is litigating this challenge on this schedule because he chose to do so; he took a calculated risk to forego seeking a continuance and defend this claim quickly. Trump's complaints after making that choice ring hollow. So too does Trump's claim that he is unaware of and cannot review the evidence against him in this challenge. The events of January 6 and his role in them have been the subject of intense investigation, criminal and civil litigation, and public scrutiny for nearly four years. As Trump's counsel acknowledged, Trump has been defending ballot access cases in multiple states, including in a recently concluded five-day trial in Colorado that is still being appealed. That trial relied on the same evidence brought in this challenge and was defended by the same counsel for Trump. *See generally*, Sherman Ex. 21, Anderson Final Order. Virtually none of that evidence pertains to facts and events that were previously unknown to Trump; instead, it is evidence of Trump's own public statements and events that have been at the center of public discourse about one of the most analyzed days in American history. *Id.*

II. Trump's "Evidence" is Inadmissible.

To bootstrap his arguments, Trump in the Objections attempts to introduce approximately 25 new exhibits. That evidence is untimely. It should have been introduced at the evidentiary hearing on Friday and cannot be introduced after the close of the evidence. Although many of the

exhibits have not even been produced to Challengers (Exhibits 28-50, *see* attached email), at least one of them that was produced graphically illustrates the problem: The Affidavit of Troy Nehls is inadmissible because it is a writing and the affiant was not present to be cross-examined as required by the Maine Administrative Procedure Act. 5 M.R.S. §9057 (5). It also is not even notarized. Accordingly, all the references to these exhibits in the filing and attempts to bootstrap the arguments based on these exhibits—pages 6-24 of Trump's Objections— must be disregarded

III. The Evidence from *Anderson v. Griswold* is Admissible Under Any Standard.

Trump's objection to the admission of evidence from *Anderson v. Griswold* entirely misses the point. Trump relies on *Cabral v. L'Heureux* for the proposition that in Maine, limits on a court's use of judicial notice precludes consideration of the Colorado evidence. But Challengers have not asked the Secretary to take judicial notice of the Colorado proceedings. Rather, we have introduced sworn testimony and Trump's statements as evidence admissible under both section 9057 and the Rules of Evidence. Both the testimony and the exhibits introduced through that testimony are "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." Even under the Rules of Evidence, moreover, both that testimony and Trump's statements are admissible: the testimony in the Colorado case was subject to cross-examination by Trump and the witnesses were unavailable to testify at the Friday hearing, which makes that testimony admissible under M.R.E. 804. *See* Ex. 9, 14, 19, 23, 29, 33.

IV. The January 6 Report is Admissible

The *Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol* (the "January 6 Report") is, as it was found by the Colorado District Court,

reliable and admissible under both M.R.S. §9057 (2) and M.R.E. 803(8)(A), which excludes from the hearsay rule "records" setting out "factual findings from a legally authorized investigation" unless "sources of information or other circumstances indicate lack of trustworthiness." *See* Sherman Ex. 21, Anderson Final Order ¶ 38. Admissibility is presumed and the party seeking exclusion "bears the burden of demonstrating that the report is not trustworthy." *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) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) and F.R.E. 803 advisory committee's note).

Under *Barry*, the reliability of the January 6 Report depends on the applicable of four factors: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems. *Barry,* 467 F. Supp. 2d at 97. Trump does not dispute that the first three *Barry* factors, as described in *Anderson*, "weigh strongly in favor of reliability." Sherman Ex. 21, Anderson Final Order ¶ 25 (citing temporal proximity to January 6, an investigation by "well-staffed, highly skilled" attorneys, and the Committee's 10 public hearings). Rather, he claims that the findings of the Committee in the January 6 Report are untrustworthy because of alleged bias in the House Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Committee"). Obj. at 6-24. As noted above, these arguments rest entirely on exhibits included in the Objections that were not submitted during the evidentiary phase of the hearing. This entire line of argument, accordingly, must be disregarded.

To the extent the Secretary considers this late evidence, which she should not, it must be rejected. *Nowhere* in the Objections does Trump identify a finding that is incorrect or

unsupported. Instead, Trump essentially argues that the January 6 Committee was not bipartisan, irregularly constituted, and politically motivated and that–despite Trump's inability to identify any inaccurate findings–the January 6 Report and its findings must be unreliable.

Trump made the same arguments in *Anderson* and, after hearing the evidence, the Court rejected them and admitted the January 6 Report. Sherman Ex. 21, Anderson Final Order ¶¶ 20-38. In so doing, the Colorado District Court identified powerful indicia of the thorough and objective process by which the Committee conducted its investigation and created the January 6 Report, including: the examination of more than 1,000 witnesses who overwhelmingly were Trump administration officials and Republicans, the review of over 1 million documents, hundreds of hours of video, and 60 court rulings, openness of the Committee members to any outcome, unanimity in the Committee's conclusions, and the membership of two multi-term Republicans, including the third-highest ranking House Republican. *Id.* ¶¶ 24-26, 31–34.

Trump asserts that Committee members—who had lived January 6 and heard evidence during an impeachment inquiry—were biased because they voted to impeach him for inciting an insurrection and publicly stated that he was culpable. *Id.* ¶ 25–26. The Colorado District Court found that no alleged bias tainted the January 6 Report, crediting testimony that the members had merely formed a hypothesis that was then tested through meticulous investigation. *Id.* ¶¶ 26, 33. Even if it had not, Trump cites no authority that knowledge of matters of public information and investigation constitute a "motivation problem" under *Barry*. 467 F. Supp. 2d at 97.

In the face of unrefuted proof that the January 6 Report was meticulously developed and not influenced by the alleged biases of its members, Trump resorts to simply repeating the inadmissible criticisms of Trump's political allies, none of whom were involved in any aspect of the Committee's investigation or the development of the January 6 Report. Their fundamental

argument, that the Committee is illegitimate because it did not have specific Republican members of Congress requested by Republican leadership and therefore was driven by anti-Trump politcal animus, is contradicted by simple fact. Congressional Democrats originally sought to appoint an independent and bipartisan commission to investigate the insurrection of January 6. Trump Mot. Ex. C, Pelosi statement 7/21/2021; Ex. 1, New York Times, *Democrats failed to get enough votes for an independent inquiry into the Jan. 6 riot* (5/28/2021); Report of the January 6 Select Committee ("J6 Report"), at 128-129. But that legislation failed in the Senate despite bipartisan support when it could not obtain enough Republican votes to survive a filibuster. J6 Report at 128-129.

Still committed to proceeding on a bipartisan basis, Speaker Nancy Pelosi announced the formation of a House Select Committee that would have eight members appointed by the Speaker and five members appointed by Republican minority leader Kevin McCarthy. Ex. 2, Forbes, *Pelosi To Pick 8 Of 13 Members For Capitol Riot Select Committee – One May Be A Republican* (6/28/2021). One of Speaker Pelosi's nominees was a Republican (Rep. Liz Cheney), meaning that the proposed composition of the Committee would be seven Democrats and six Republicans.

Ultimately, Republicans chose to boycott. Two of Mr. McCarthy's five selections (Rep. Jim Jordan and Rep. Jim Banks) were not serious choices for a genuine investigation. Rep. Jordan was a material witness in the January 6 Committee's investigation. *See* Ex. 3, CNBC, *Trump allies Jordan and Banks were 'ridiculous' choices for Jan. 6 commission, Pelosi says* (7/22/2021); J6 Report at 130; *see also* Ex. 4, J6 Committee 12/22/2022 Letter to Rep. Jim Jordan. Representative Banks not only voted to decertify the 2020 election, but also made statements suggesting that the Committee needed to investigate the "Biden administration's"

response to January 6, even though (of course) President Biden had not yet taken office. Ex. 3; *see also* J6 Report at 130. Because these two representatives appeared bent on delegitimizing the Committee's investigation before it even began, Speaker Pelosi determined they should not be seated on the Committee. Ex. 5, The Hill, *McCarthy yanks all GOP picks from Jan. 6 committee* (7/21/21). Still, she made clear she would seat the remaining three Republican nominees and invited Rep. McCarthy to nominate two additional Republican names. *Id.*; *see also* J6 Report at 130-131. Rather than do so, Rep. McCarthy made a tactical decision to withdraw *all* of his nominees from the January 6 Committee. *Id.;* J6 Report at 130-131.

That certain Trump allies who may have had a political motive to sabotage the investigation into the insurrection on January 6 did not participate in the investigation does not mean its findings were biased or otherwise unreliable. To the contrary, the Committee's findings derived from a careful and deliberative process by a bipartisan investigative staff, and reflected the unanimous findings of a committee composed of both Republicans and Democrats. There is no basis for exclusion, as the Colorado court correctly concluded. *See* Sherman Ex. 21, Anderson Final Order ¶¶ 24–26, 30–34, 37 (finding various indicia that investigation was thorough and unbiased in response to Trump's bias claims, no minority report because Report was adopted unanimously, no minority staff because it was "actively prevented" by Republican leadership, Trump chose not to participate in adversarial process by refusing Committee subpoena and declining to challenge findings at Hearing).

Finally, Trump's claim that the January 6 Report contained "hearsay within hearsay" is incorrect and insufficient. 5 M.R.S. § 9057 functionally eliminates the hearsay rule, subject to the evidence being the type reasonable people would rely on. He identifies no specific portion of any January 6 Report finding that contains impermissible hearsay but merely asserts a sweeping

objection. To the extent the Objection refers to statements by Trump, statements and documents establishing Trump's knowledge, conversations between Trump and his agents, statements of Trump supporters offered to establish his influence, and statements reflecting the then-existing emotional condition of the mob, they are all either not hearsay or fit at least one hearsay exception.

Trump objects to 14 specific conclusions of the January 6 Report with a litany of misplaced arguments. (Obj. at 26-32). His hearsay objection to each of these ignores the fact that they are based on statements by Trump or other statements establishing his state of mind. The conclusions are not speculation or opinion, but well-established facts, and highly relevant to the issue of whether Trump engaged in an insurrection. The factual conclusions contained within the January 6 Report fall squarely within M.R.E. 803(8).

The reliability of the January 6 Report is further bolstered by the fact its fundamental premises were confirmed by the factual record in *Anderson*–the only litigation where Trump was challenged to refute its findings. Trump did not just fail to do so, he "was unable to provide . . . *any* credible evidence which would discredit" them. Sherman Ex. 21, Anderson Final Order ¶ ¶ 37 (emphasis added). Instead, the evidence in *Anderson* supported all of the January 6 Report's material conclusions. The unrefuted testimony of the insurrection's survivors establishes the fact of an insurrection. The testimonies of Officers Hodges and Pingeon and Representatives Swalwell and Buck, bolstered by additional unchallenged evidence, establish that a mob of thousands came to the Capitol from the area of the Ellipse, understood that it was acting at Trump's direction, communicated through word and deed its common purpose of stopping the vote certification to keep Trump in power, launched a deadly attack on the Capitol and the officers defending it, violently breached the building, and forced the suspension of the

Constitutional transfer of power. *Id.* ¶¶ 146-150, 153-168, 176-179. That evidence alone establishes that there was an insurrection.

With respect to Trump's role, Trump's public statements demonstrate his courtship of political extremists; his knowledge and approval of extremist conduct by his supporters; repeated false allegations of fraud and a stolen election; attacks on state officials, the Supreme Court, Congress, and Vice President Pence; calls by Trump to come to Washington on January 6; and directives for his supporters to "fight" before they "don't have a country anymore." *Id* ¶¶ 65-77, 79-85, 87-96, 101, 103-106, 108-113, 115, 118-122, 125-127, 129, 135-140, 144-145, 170, 172-173, 178, 186-187, 189-190. They include the Ellipse speech that Trump used to finally send the mob to the Capitol, his misleading tweets about the ongoing attack, his 2:24 pm tweet attacking Vice President Pence, his sympathetic 4:17 pm message to the mob, and his warning to the public that "these are things and events that happen" when he does not get what he wants. *Id.* ¶¶ 170, 172-173, 178, 180, 189-190. Trump's public statements alone are sufficient to establish his intent and his engagement in the insurrection.

Extensive additional evidence supports these conclusions. For example, Trump's own witnesses and evidence confirmed that his supporters react to his speeches and came to Washington because they believed the election was stolen, Trump knew that extremists were in Washington on January 6, thousands of people stayed outside the security checkpoints at the Ellipse, and their purpose was to stop the certification. *Id.* ¶¶ 48, 126 (citing testimony of Trump witness K. Pierson); *id.* ¶¶ 130, 132, 143 (citing testimony of Trump witness A. Kremer); *id.* ¶¶ 168 (citing testimony of Trump witness K. Buck). Unrebutted expert testimony established the links between Trump's public statements, political extremists, and his incitement of the attack on the Capitol, and the unused courses of action to quell the attack available to Trump. 11/17/2023

Order ¶¶ 61-87, 105, 107, 109, 117, 142-145, 165, 181-85 (basing conclusions on testimonies of Professors Simi and Banks). Unrefuted documentary evidence established the violent reaction of the crowd to Trump's Ellipse speech, the size of the crowd there, the weapons and military gear used by the mob, the mob's approach from the Ellipse, and the attack itself. Sherman Ex. 1, 10-21, 92, 166.

V. Other Objections to Specific Exhibits

Trump objects to a number of Challengers' exhibits on relevancy and authenticity grounds. But as Attorney Dietrich pointed out, Trump has waived any authenticity objection by not cross-examining Donald Sherman, whose Affidavit authenticated the exhibits. (*See* attached email). As for the relevancy objection to Videos, Photographs, and Associated Transcripts (Obj. at 34), (1) the video from the Inauguration (No. 6) shows Trump taking the oath of office, establishing that he took the oath as contemplated by section 3; (2) No. 38 is a video from a May 2023 Town Hall in which Trump tries to explain why he didn't ask his supporters to leave the Capitol, showing his continuing participation in the insurrection; (3) No. 39 is a video of Trump speaking at a campaign rally in 2015 showing his approval of violence against his opponents, of which there are multiple examples, including the encouragement of violence as the Colorado court found (paras.65-80); and (4) No. 63 which contains Trump's speech at the Ellipse urging his supporters to march on the Capitol on January 6. No.61 contains photographs from the January 6 rally and are highly relevant to the subsequent storming of the Capitol. As for the body-cam footage of Officer Hodges, it is hard to imagine more relevant evidence about the attack on the Capitol and it was introduced during the testimony of Officer Hodges in Colorado.

Trump also objects to the compilation of his own tweets, but these are plainly relevant both as to what Trump did but also to his state of mind (Nos.37 and 80). They are statements of

an opposing party and admissible. No. 62 is the January 6 Report discussed above and No. 60 is a GAO Report that is both an official government report and bears on Trump's state of mind. Nos. 78 and 79 are official records of the Office of the Secretary of State, go to the falsity of Trump's claims of election fraud, and show his intent to promote the "Big Lie" to inflame his supporters. The Magliocca CV and list of examples of statements by the drafters and others expressing concerns about the possibility of Jefferson Davis becoming President should there be a general amnesty are both relevant and were the subject of testimony by Professor Magliocca at the hearing. (Nos. 82 and 83). Finally, the objection to the written statement of Professor Simi is irrelevant since Professor Simi testified in Colorado and his testimony is part of the record. (Anderson Day 2 Tr. at 11-235).

VI. The First Amendment Claim has Nothing to do with Admissibility

Finally, Trump's attempt to insert a First Amendment argument in his Objections confuses admissibility with the merits of one of Trump's purported defenses. Trump's statements are admissible under M.R.E 801. How much weight they should be given and whether he should be held accountable for them presents an entirely different issue. And as the First Amendment Scholars brief demonstrates, there is no First Amendment defense to the integral role Trump's speech played in the insurrection and Trump's incitement of it. (No. 84).

CONCLUSION

For the foregoing reasons, all Trump's evidentiary objections should be denied and all Challengers' evidence admitted under 5 M.R.S. §9057.

Dated at Brunswick, Maine this December 19, 2023.

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