CREW
CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

December 14, 2023

By Email and Hand Delivery

The Honorable Shenna Bellows
Office of the Secretary of State
148 State House Station
Augusta, Maine 04333-0418

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

Dear Secretary Bellows:

In accordance with the December 11, 2023 Notice of Hearing in the above-referenced matter, Citizens for Responsibility and Ethics in Washington ("CREW"), through undersigned counsel, respectfully requests to intervene in support of Challengers Kimberly Rosen, Thomas Saviello, and Ethan Strimling ("Challengers") for the limited purpose of submitting this brief and accompanying affidavit of Donald Sherman authenticating certain court records. As required by 5 M.R.S. § 9057(5), Mr. Sherman will be present and available for cross examination on the matters set forth in his affidavit at the hearing on December 15, 2023. If CREW is permitted to intervene on a limited basis, please allow this letter to serve as the entry of appearance of Attorney Jonathan Maier of CREW and Attorney Amy Dieterich, Maine Bar No. 5413, as local co-counsel for CREW. In addition, CREW seeks permission for Attorney Maier to appear remotely (by videoconference or teleconference) as counsel for Mr. Sherman if he is called to testify.

CREW's interest in this matter stems from its unique expertise and experience litigating cases under Section 3 of the Fourteenth Amendment ("Section 3"). CREW currently represents a

group of New Mexico residents who successfully sued in state court to disqualify and remove a county commissioner under Section 3 for his role in the January 6, 2021 insurrection. *See New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Ct. Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022). Of particular relevance here, CREW also represents a group of Republican and unaffiliated Colorado voters in state court litigation to enforce former President Trump's ineligibility for the presidential ballot based on his disqualification under Section 3. *See Anderson v Griswold*, No. 2023-CV-32577 (Colo. Dist. Ct. filed Sept. 6, 2022). Both *Anderson* and *Griffin* proceeded to bench trials on the merits. True and correct copies of the *Anderson* and *Griffin* trial transcripts and pertinent court records are submitted here as exhibits to the Affidavit of Donald Sherman ("Sherman Aff.").

CREW submits this brief to address the admissibility of the *Anderson* and *Griffin* trial testimony—on which Challengers rely—under the Maine Administrative Procedures Act ("APA"). CREW also provides arguments as to the admissibility of the bipartisan *Final Report of the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol*, H. Rep. 117-663, 117th Cong., 2d Sess., (Dec. 22, 2022), https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf ("January 6 Report").

Standard for Admissibility under the APA

"Evidentiary matters in administrative proceedings are governed by 5 M.R.S. § 9057." *Maddocks v. Unemployment Ins. Comm'n*, 2001 ME 60, ¶ 12, 768 A.2d 1023, 1026. Under § 9057, "agencies need not observe the rules of evidence observed by court"; rather, "[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(1), (2). Evidence should be admitted

where the proponent establishes a proper foundation and the evidence has sufficient indicia of reliability. *See Maddocks*, 2001 ME 60, ¶¶ 17-18 (evidence properly admitted where party "established a foundation for admitting the documents by describing the process and the circumstances in which the information was obtained").

Argument

Here, the prior trial testimony and January 6 report would meet the higher bar for admissibility in a *judicial* proceeding and thus easily passes § 9057's lower admissibility threshold.[1]

I. Trial Testimony from *Anderson* and *Griffin* is Admissible and Trump Had a Prior Opportunity to Cross-Examine the Witnesses

Trial testimony from *Anderson* and *Griffin* is admissible under § 9057. On its face, sworn testimony in a judicial proceeding has a baseline "assurance of reliability." *Maddocks*, 2001 ME 60, ¶ 17; *see also Evans v. Lockheed Martin*, 2013 N.C. Wrk. Comp. LEXIS 82, at *10–19 (N.C.I.C. 2013) (admitting prior testimony in administrative proceeding); *Terry v. Horton*, 2006 S.C. Wrk. Comp. LEXIS 552, at *7 (S.C.W.C.C. 2006) (same); *cf. Heal v. Maine Emp. Sec. Comm'n*, 447 A.2d 1223, 1226 (Me. 1982) (deeming evidence inadmissible in APA case where "[t]he documents on their face do not supply any assurance of reliability," the "statements are unsworn, and the identity of the hearsay informant is uncertain"). The accompanying affidavit authenticates the *Anderson* and *Griffin* trial transcripts. *See* Sherman Aff. Exs. 1–2, 5–10.

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[1] In addition to the prior trial testimony and related trial exhibits, the exhibits to the Sherman Affidavit include pertinent court decisions and other filings that are provided not as substantive evidence here, but rather to aid the Secretary's consideration of relevant *legal* issues. These court records are subject to judicial notice. *See* M.R. Evid. 201(b); *Cabral v. L'Heureux*, 2017 ME 50, ¶ 10, 157 A.3d 795, 797 ("Courts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings.").

Moreover, former President Trump was a party in *Anderson*, and the case concerned the same issues presented here—whether Trump engaged in insurrection against the Constitution on and around January 6, 2021 within the meaning of Section 3 of the Fourteenth Amendment. Trump was represented by counsel at trial and had ample opportunity and similar motive to develop witness testimony by direct, cross, or redirect examination.[2] Each *Anderson* witness resides outside of Maine and thus is beyond the Secretary's subpoena power under 5 M.R.S. § 9060(1)(a), and, given the expedited timeline of these proceedings, there is limited opportunity to secure their voluntary testimony. In these circumstances, the *Anderson* trial testimony would be admissible against Trump in a *judicial* proceeding under Maine Rule of Evidence 804(b)(1) (former testimony by unavailable witness),[3] and thus surely meets § 9057's *lower* admissibility standard.

The Secretary may also admit the trial testimony of Officer Daniel Hodges in *Griffin*, as it is substantially similar to his later testimony in *Anderson*, where he was cross-examined by Trump's counsel at trial. *Compare* Sherman Aff. Ex. 5 (*Anderson* 10/30/23 Trial Tr. at 66:12-128:6), *with id.* Ex. 1 (*Griffin* 08/15/22 Trial Tr. at 147:16-204:9).

Finally, 5 M.R.S. § 9057(5) does not require that the *Anderson* witnesses be available for cross-examination at the December 15, 2023 hearing. That provision only applies to "sworn *written* evidence"—such as an affidavit—submitted *in the first instance* at an agency hearing.

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[2] As the district court in *Anderson* explained, Trump failed to avail himself of opportunities to seek fact discovery and never articulated what discovery he might have required to protect his interests. *See* Sherman Aff. Ex. 20 (*Anderson*, 10/28/2023 Order Re: Standard of Proof, at 3 n.2); *id.* Ex. 21 (*Anderson*, 11/17/2023 Final Order ¶ 37 n.6).

[3] The *Anderson* trial testimony would fall within Rule 804(b)(1) regardless of the outcome of the case on appeal. *See* Charles McCormick, 2 McCormick on Evidence § 305 (8th ed. 2022); *U.S. v. 205.03 Acres of Land, More or Less, in Warren County, State of Pa.*, 251 F. Supp. 866, 867 (W.D. Pa. 1966).

The prior testimony here is not "sworn written evidence"; it is prior trial testimony in a case in which Trump was a party and cross-examined adverse witnesses.

II. The January 6 Report is Admissible

The bipartisan January 6 Report is likewise admissible under § 9057. As the *Anderson* court explained in admitting the January 6 Report under Colorado's equivalent of Maine Rule of Evidence 803(8), the report is presumptively admissible, reliable, and trustworthy. These conclusions were reinforced by the trial testimony of Timothy Heaphy, the former Chief Investigative Counsel for the January 6 Committee. Sherman Aff., Ex. 21 (*Anderson*, 11/17/2023 Final Order ¶¶ 20-38, 46); *id.* Ex. 9 (*Anderson* 11/03/23 Trial Tr. 145:22-221:10). Despite having the "opportunity to subject [the report's] findings to the adversarial process," Trump failed "to provide the Court with any credible evidence which would discredit the factual findings of the January 6th Report," instead levying groundless accusations that the report was "politically motivated." Ex. 21 (*Anderson*, 11/17/2023 Final Order ¶¶ 28, 37). Of course, all congressional reports have some political motivation, yet Rule 803(8)(C) presumes their admissibility and courts regularly admit them. *See, e.g.*, *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers*, 467 F. Supp. 2d 91, 98-99 (D.D.C. 2006) (admitting Senate report); Sherman Aff., Ex. 21 (*Anderson*, 11/17/2023 Final Order ¶ 28 (citing cases)).

Since the January 6 Report meets the higher bar for admissibility in a judicial proceeding, it certainly qualifies for admission here under § 9057.

Conclusion

Because the prior trial testimony and January 6 Report are "the kind[s] of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs," they "shall be admitted" in this proceeding. 5 M.R.S. § 9057(2).

Respectfully submitted,

Amy Dieterich,
SKELTON TAINTOR & ABBOTT
[redacted]

/s/ Jonathan Maier
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[redacted]

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