STATE OF MAINE

MAINE SUPREME JUDICIAL COURT- Sitting as the Law Court

Docket No. Ken-24-24

Donald J. Trump,

Appellee.

v.

Secretary of State et al,

Appellant

RESPONSE TO LAW COURT'S SHOW CAUSE ORDER AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

President Trump hereby submits a brief in response to the Court's January 19, 2024, Order to Show Cause Why Appeal Should Not Be Dismissed as Interlocutory ("Order"), supporting dismissal of the Secretary and Challengers' notices of appeal. In this response to the show cause order, President Trump has not addressed the merits of the Superior Court's decision to remand this matter or the underlying ruling issued by the Secretary of State. President Trump understands the Order and attendant briefing schedule to satisfy the requirements of 21-A.M.R.S. § 337(2)(E), which provides that "the parties have 4 days to file briefs and appendices with the clerk of courts" upon an appeal to the Law Court. In the event that it does not, President Trump requests that this Court stay the briefing schedule required by 21-A.M.R.S. § 337(2)(E)

pending resolution of the issues identified in the Order to allow President Trump to fully brief the substantive issues.

This Response assumes familiarity with the procedural events leading to the Secretary of State's ruling barring President Trump from the ballot, which are, in any event, recounted in the Superior Court's opinion.

On January 2, 2023, President Trump timely appealed the Secretary's ruling to the Superior Court in accordance with M.R.C.P. 80C and 21-A M.R.S. § 337.[1] While that appeal was pending, the Supreme Court granted President Trump's petition for certiorari to review a decision of the Colorado Supreme Court purporting to disqualify President Trump from appearing on the Republican Party primary ballot under section 3 of the Fourteenth Amendment, *see Trump v. Anderson*, *et al.*, Case No. 23-719 (U.S. Jan. 5, 2024) ("*Anderson*"), and scheduled oral argument for February 8, 2024.

On January 17, Justice Murphy issued her opinion, remanding the case to the Secretary for reconsideration in light of the forthcoming Supreme Court opinion. She recognized that most of the issues before her were identical to those currently before the U.S. Supreme Court in *Trump v. Anderson*, Case No. 23-719 (2023), *Superior Court Ruling, at 7*, identified at least six legal issues of first impression, *id,* at 13, and stated that "many of the issues presented in this case are likely to be resolved, narrowed, or

[1] President Trump's appeal to the Superior Court contended: the Secretary exceeded her authority under state law; President Trump did not receive due process in the administrative proceeding; the Secretary was a biased decisionmaker; and that Section Three of the Fourteenth Amendment cannot be interpreted as a matter of law to invalidate his primary petition.

rendered moot by the Supreme Court's decision in *Anderson*" and therefore a "remand is necessary within the meaning of the APA under these unique circumstances." *Superior Court Ruling*, at 3.

Justice's Murphy's eminently practical ruling was intended to foster judicial economy, recognizing that for the Maine courts to resolve important constitutional issues of first impression would be inefficient and inappropriate, because the United States Supreme Court was about to do so. *Superior Court Ruling,* at 4. She also recognized that all parties had already agreed to stay the Secretary's decision until the Supreme Court issue a decision in *Anderson*, which will take place after Maine sends ballots to military and overseas voters, after all primary ballots are printed, after many voters will have voted in the primary, and perhaps after Maine's primary on March 5, 2024. *Superior Court Ruling*, at 3.

Justice Murphy issued her decision to remand on January 17, 2024. The Secretary appealed Justice Murphy's decision to remand the case on January 19, 2024. That same day, this Court issued an order for the Secretary to show cause why her appeal should not be dismissed as an improper interlocutory appeal. On January 22, 2024, Kimberley Rosen, Thomas Saviello, and Ethan Strimling, who were challengers in the proceedings before the Secretary, also filed a notice of appeal.

ARGUMENT

1. THE SUPERIOR COURT'S ORDER IS NOT AN APPEALABLE FINAL JUDGMENT.

The final judgment rule provides that the Law Court will not ordinarily entertain an appeal unless and until there is a final judgment of the Superior Court. "The final judgment rule is a judicially-created doctrine that 'promotes judicial economy and curtails interruption, delay, duplication and harassment.'" *Cutting v. Down East Orthopedic Associates, P.A.*, 2021 ME 1, ¶ 15 (quoting *Dep't of Hum. Servs. v. Lowatchie*, 569 A.2d 197, 199 (Me. 1990)).

"A final judgment or final administrative action is a decision that fully decided and disposes of the entire matter pending before the court or administrative agency, leaving no questions for future consideration and judgment of the court or administrative agency." *Aubry v. Town of Mt. Desert*, 2010 ME 111, ¶ 4. The judicially created final judgment rule is rooted in sound judicial principles. "It helps curtail interruption, delay, duplication and harassment; it minimizes interference with the trial process; it serves the goal of judicial economy; and it saves the appellate court from deciding issues which may ultimately be mooted, thus not only leave a crisper, more comprehensive record for review in the end but also in many cases avoiding an appeal altogether." *State v. Maine State Employees Asso.*, 482 A.2d 461, 463 (Me. 1984) (citing 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3907 (1976)).

"As a general proposition, in Rule 80C appeals, a Superior Court judgment that

remands the case to an executive agency or municipal government for additional decision-making is not final, and we will not entertain interlocutory appeals taken from such judgments." *Forest Ecology Network v. Land Use Regulation Comm'n.*, 2012 ME 36, ¶ 16. Rule 80C itself states that there may not be an appeal from an order remanding the case:

> **(m) Appeal to the Law Court.** If the court remands the case for further proceedings, all issues raised on the court's review of the agency action shall be preserved in a subsequent appeal taken from a final judgment entered on review of such agency action. Appeal to the Law Court of a review proceeding in the court shall be as provided by 5 M.R.S.Â. § 11008.

The advisory committee's notes for Rule 80C are explicit that an order of remand is not a final judgment from which there can be an appeal to this court:

> Rule 80C(m) is amended to clarify that *an order of remand from the Superior Court to the governmental agency is not a final judgment from which an appeal lies*, absent special circumstances. The amendment is not intended to change the law governing final judgments, moot issues or the preservation of issues for appeal. The amendment simply makes clear that in the ordinary case, an order of remand is not appealable and, to the extent that issues have been properly preserved throughout the course of the proceedings and are ripe for appeal when the remanded issues have been decided, the appeal from the final judgment preserves issues raised prior to the remand.

Advisory Committee's Notes to Rule 80C, June 2, 1997 (emphasis supplied).

This Court has frequently affirmed the principles of Rule 80C(m). "Generally, in Rule 80C appeals, a remand from the Superior Court to an executive agency for additional decision-making is not a final judgment." *Estate of Pirozolo v. Dep't of Marin Res.*, 2017 ME 147, ¶ 5. The rule that the Law Court will not entertain an interlocutory appeal from a Rule 80C remand, because the rule "is intended to avoid piecemeal

appeals and to promote the efficient and effective resolution of legal disputes." *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 16 (citing *Millett v. Atl. Richfield Co.*, 2000 ME 178, ¶ 8). In *State v. Me. State Emps. Ass'n*, the court declined to entertain an interlocutory appeal because "it is most unlikely that judicial review of the administrative proceedings at this juncture would settle the matters in dispute with any finality" and the Law Court did not want to issue an advisory opinion. *State v. Me. State Emps. Ass'n*, 482 A.2d 461, 465 (Me. 1984).

By definition the Superior Court's decision to remand is not a final judgment. There is still more to do. Indeed, it precisely fulfills the underlying purposes of Rule 80C. Remand serves judicial economy and prevents Maine's courts from wasting time and effort on federal questions that will soon be resolved by the Supreme Court. This Court's decision is unlikely to settle the federal issues with any finality, and it will be short-lived in its usefulness. Indeed, the case below will come to this Court—if at all—in a much different posture following the forthcoming decision in *Anderson*. If President Trump prevails on his federal arguments, the Supreme Court's decision will effectively decide the current matter. If President Trump does not prevail on those issues, the decision will nonetheless likely resolve the federal issues at hand, narrowing the issues to the Secretary's authority under state law. It is most prudent and efficient to do as the Superior Court ordered and await the decision in *Anderson* before proceeding any further.

2. THIS CASE DOES NOT FALL INTO ANY OF THE EXCEPTIONS TO THE FINAL

JUDGMENT RULE.

Exceptions to the final judgment rule are "few, narrow, and well defined." *State v. Maine State Employees Asso.*, 482 A.2d 461, 463 (Me. 1984). The three "well-established exceptions" to the final judgment rule are (1) the death knell exception, (2) the collateral order exception, and (3) the judicial economy exception. *Town of Minot v. Starbird*, 2012 ME 25, ¶ 8. As shown below, the Secretary cannot meet the requisite conditions under any of three exceptions.

The Death Knell Exception. This exception "allows a party to appeal an interlocutory order immediately if substantial rights of that party will be irreparably lost if review is delayed until final judgment." *In re Evelyn A.*, 2017 ME 182, ¶ 14. A right is irreparably lost if the court "could not effectively provide a remedy to the appellant if we untimely decided to vacate the interlocutory determination after a final judgment." *In re Estate of Kingsbury*, 2008 ME 79, ¶ 5. This exception allows the Law Court "to immediately review an interlocutory order "when failure to do so would preclude any effective review or would result in irreparable injury." *In re Bailey M.*, 2002 ME 12, ¶ 7. It is only available when the injury to the plaintiff's claimed right would otherwise be "imminent, concrete, and irreparable." *In re Bailey M.*, 2002 ME 12, ¶ 7 (citing *Morse Bros., Inc. v. Webster,* 2001 ME 70, ¶ 14). A loss is not irreparable "if the harm is temporary and will only last for the duration of the litigation." *In re Estate of Kingsbury*, 2008 ME 79, ¶ 5 (quoting *In re Bailey M.*, 2002 ME 12, ¶ 7).

This Court restricts this exception to limited circumstances. *See In re Evelyn A.*,

2017 ME 18, ¶ 14 (holding a previous delay in reaching the claim of ineffectiveness of counsel and the number of years that the subject child have been in foster care necessitated a review for further harm to the children); *In re Estate of Kingsbury,* 2008 ME 79, ¶ 6 (holding that if the appeal was not considered, the estate would forever lose the right to prevent a decedent's body from being exhumed); *In re Bailey M.*, 2002 ME 12, ¶ 8 (holding that a mother's appeal to have an open hearing in order to repair her reputation could result in an irreparable harm if the appeal was not heard).

This is not an appropriate case for this exception. The Secretary faces no threat of an imminent, concrete, and irreparable injury. Indeed, she faces no harm regardless of whether a candidate appears on the ballot. And the contention that the pending primary election and the need for legal clarity "before ballots are counted, promoting trust in our free, safe, and secure elections"[2] causes irreparable harm falls flat.

First, the Secretary agreed to stay the effect of her ruling until the Supreme Court rules in *Anderson*. Order and Decision at 2, *Trump v. Bellows*, Civ. Docket No. AP-24-01 (ME Super. Ct. Jan. 17, 2024) ("[T]he Secretary and all the parties in this case, in light of the United States Supreme Court's acceptance of President Trump's petition for writ of certiorari for review of the Colorado Supreme Court's decision, have agreed that the

[2] *See* the Secretary's public comment on the pending appeal, Joe Lawlor, *Maine Secretary of State ask state supreme court to review Trump ballot decision*, PORTLAND PRESS HERALD, January 19, 2024 (https://www.pressherald.com/2024/01/02/appeal-filed-in-response-to-maine-secretary-of-states-decision-to-bar-trump-from-primary-ballot/) (stating "This appeal ensures that Maine's highest court has the opportunity to weigh in now, before ballots are counted, promoting trust in our free, safe, and secure elections.").

Secretary's Ruling should continued to be stayed pending the United States Supreme Court's decision."). Any claim of irreparable harm at this stage rings hollow in light of this agreement. This conclusion is further reinforced by the fact that the Secretary unilaterally stayed her own decision pending review by the Superior Court. Surely if the harm in not having the Law Court settle this issue was so irreparable and that the courts "could not effectively provide a remedy to the appellant if we untimely decided to vacate the interlocutory determination after a final judgment" she would not have stayed the effect of her decision, not once, but twice.

Second, Maine's use of ranked choice voting also eliminates any harm if President Trump is ultimately disqualified. If the Superior Court and Law Court ultimately decide the federal issues in favor of President Trump, but the Supreme Court in *Trump* finds against President Trump, no irreparable harm will take place, because Maine officials can retabulate the ranked choice ballots to determine the winner by looking to the second and subsequent choice candidates. *See* 21-A M.R.S. § 723-A.

By contrast, Maine voters and President Trump would face irreparable harm in two ways: First, the Law Court could consider this appeal on the merits and create confusion from differing opinions before or during the pendency of the election. Many of the very issues on appeal before the Law Court are on appeal with the Supreme Court. If these issues are resolved in President Trump's favor, they will be dispositive of this matter. It would *increase* uncertainty if this Court were to render a decision on the merits of this appeal, pending an appeal of those very issues before the Supreme

Court. Voters could be faced with two different court decisions in the span of weeks, even while they are voting. Differing opinions and sudden reversals during the election cycle would undoubtedly confuse voters.

Next, if the Law Court were to decide this appeal on the merits against President Trump, and the Supreme Court were to find in favor of President Trump. President Trump would have been improperly removed from the ballot before the election, depriving Maine voters of a valid choice for president, and illegally depriving President Trump the opportunity to stand before Maine voters as a candidate.

Collateral Issue Exception. The collateral order exception to the final judgment rule applies only if the appellant can establish that: (1) the decision is a final determination of a claim separable from the gravamen of the litigation; (2) it presents a major unsettled question of law; and (3) it would result in irreparable loss of the rights claimed, absent immediate review. *United States Dep't of Agric., Rural Hous. Serv. v. Carter*, 2022 ME 103, ¶ 8. In *Carter*, the appellant appealed the denial of a motion for summary judgment to the Law Court, and he contended that whether he was entitled to judgment as a matter of law was a separable question from the underlying action. This Court disagreed because whether the appellant was "entitled to judgment as a matter of law involves the same basic determination that will have to be made at trial." *Id.* ¶ 9. This Court further found that the appellant faced no irreparable loss of rights if he could not appeal the denial of summary judgment, because neither the expense of litigation nor the potential harm to his credit by the litigation constituted irreparable harm. *Id.* ¶¶ 10-11. Rather, as

this Court acknowledged, any harm would be only temporary.

In this case, the Secretary's appeal fails to meet the first and third elements of this exception. Under the first element, the remand is not a final determination of any claim, and certainly not separable form the underlying gravamen of the litigation. Currently, the Secretary can only appeal the Superior Court's discretionary decision to defer the important constitutional questions to the U.S. Supreme Court, and to remand the case back to the Secretary to reconsider, consistent with the Court's decision in *Anderson.*[3] The Secretary, by her own statement minutes after the appeal was filed, admitted that the current appeal is inextricably bound to the underlying federal issues; she publicly broadcast that she wants the Law Court to weigh in the very issues that Justice Murphy prudently deferred to the Supreme Court in her remand decision. Joe Lawlor, *Maine Secretary of State ask state supreme court to review Trump ballot decision*, PORTLAND PRESS HERALD, January 19, 2024 (https://www.pressherald.com/2024/01/02/appeal-filed-in-response-to-maine-secretary-of-states-decision-to-bar-trump-from-primary-ballot). The Secretary's issues on appeal here are not separable from the issues that are to be resolved upon remand.

The third element for the collateral issue exception, like the death knell exception, requires an irreparable loss of rights absent immediate review. As discussed

[3] Of the four orders issued by Justice Murphy, the Secretary prevailed on two (denial of President Trump's Motion to Supplement the Record and denial of President Trump's Motion to Stay Proceedings) and the Secretary consented to a third issue (an agreement to stay the effects of the Secretary's ruling).

above, the Secretary faces no irreparable harm. Finally, even the second element should not apply. To be sure, the underlying merits do present major issues of first impression—but only for a few weeks. Those issues will soon be resolved in *Anderson*.

Judicial Economy Exception. The judicial economy exception applies only "in those rare cases in which appellate review of a non-final order can establish a final, or practically final, disposition of the entire litigation. It applies when a decision on the appeal … regardless of what it is, would effectively dispose of the entire case." *Town of Minot v. Starbird*, 2012 ME 25, ¶ 9 (quoting *Bond v. Bond*, 2011 ME 105, ¶ 12); *see also State v. Me. State Emps. Ass'n*, 482 A.2d 461 (Me. 1984). "If we decide[] in favor of one alternative, but would require further litigation if we were to reach the opposite conclusion" then the appeal does not meet the requirements of the judicial economy exception. *Town of Minot v. Starbird*, 2012 ME 25, ¶ 9. In *Rosenbery v. Taylor*, 685 A.2d 768 (Me. 1996), this Court refused to apply the judicial economy exception because the Court's review of the case "would not establish a final or practically final disposition of the entire litigation." *Id.* at 769-70 For this exception to apply, there is also a second requirement that "the interest of justice require immediate review be undertaken." *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 17. There is also a subspecies of the judicial economy exception that applies in the "extraordinary circumstances" where "denial of appellate review could result in judicial interference with apparently legitimate executive department activity." *Fox Islands Wind Neighbors v. Department of Environmental Protection*, 2015 ME 53, ¶ 9 (citations omitted). Neither

variation is applicable here.

Here, reversing Justice Murphy's remand would not dispose of the entire litigation. It would instead require further litigation. And even a decision on the merits by Justice Murphy or this court will not dispose of the case. With the pendency of *Anderson*, this is not a case in which this Court can issue a final, or practically final, disposition of the entire litigation in the Secretary's favor. Accordingly, the Superior Court properly remanded the case for the Secretary to apply the facts and conclusions of law consistent with the Supreme Court's upcoming decision in *Anderson*.

If the Law Court takes up this appeal, the matter is likely to result in additional litigation. To wit, reversing the Superior Court's remand to the Secretary would likely necessitate remanding this case back to the Superior Court to rule on the outstanding questions of state and federal law presented in President Trump's appeal. Thus, unless the Superior Court's (or this Court's) ruling aligns perfectly with the Supreme Court's ruling in *Anderson*, this matter would likely need to be considered *again*, for a third time, in light of the decision in *Anderson*. This contorted chain of litigation up and down the Maine judiciary is the antithesis of judicial economy. Judicial economy favors waiting until the Supreme Court addresses the issues at stake in this case.

Moreover, the Superior Court's remand to the Secretary does not interfere with the separation of powers. The separation of powers exception is "narrowly construed and only applies when justified by 'extraordinary circumstances.'" *Forest Ecology Network v. Land Use Regulation Com'n*, 2012 ME 36, ¶ 18 (quoting *Almy v. U.S. Suzuki Motor Corp.*,

600 A.2d 400, 402 (Me. 1991)). This exception has generally been applied in two circumstances: 1) where a remand order effectively compels an executive agency to provide additional process as a matter of law, which, if not subject to interlocutory review, would likely escape judicial review,[4] and 2) where the Superior Court enjoins (or effectively enjoins) an executive agency from taking executive action.[5] Neither circumstance applies here.

First, while President Trump requested and believes additional process would be appropriate, nothing in the Superior Court's order requires the Secretary to hold a new hearing. Moreover, nothing in the Superior Court's order sets forth a new procedure that, as a matter of law, would apply to anyone beyond the parties in this case. Thus, this is not a case where a remand would effectively create a new, unappealable, generally applicable procedural requirement.

Second, the Superior Court's order does not function as an injunction against

[4] *See Forest Ecology Network v. Land Use Regulation Com'n*, 2012 ME 36, ¶ 21 ("[A]n administrative agency is appealing a court order remanding the case to the agency for an additional evidentiary hearing when there is a genuine questions to whether the hearing is required by law. . . . If we do not consider this appeal, it is reasonably possible that LURC will not be able to obtain appellate review of the court's decision that a further evidentiary hearing is required." (citing *Fitcher v. Bd. Of Envtl. Prot.*, 604 A.2d 433, 436 (Me. 1992)); *Fox Islands Wind Neighbors v. Department of Environmental Protection*, 2015 ME 53, ¶ 9 n.7 ("In addition to the Superior Court's mandate that an executive branch agency explain why it has not undertaken a specific course of action in an enforcement matter, the remand with specific instructions to the DEP to institute an operational protocol may leave the DEP without recourse to judicial review because it cannot seek appellate review of its own action.").

[5] *See Bar Harbor Banking & Trust Co. v. Alexander*, 411 A2d 74, 77 (Me. 1980) ("[T]o safeguard the separation of powers, we will review this temporary restraining order issued to restrain a state administrative agency from holding a hearing pursuant to a statute which on its face grants the agency authority to conduct such a hearing."); *State v. St. Regis Paper Co.*, 432 A.2d 383.385-387 (Me. 1981) (applying exception to review a stay of an enforcement proceeding, noting "[b]y the time the stay is lifted and proceedings are recommenced, the passage of time will have made it impossible for the prosecutor to achieve his enforcement goals and to adequately protect the public interest.").

the Secretary, either in this case or more broadly. As noted above, the Secretary has already agreed to stay the effect of her ruling pending the Supreme Court's ruling in *Anderson*. That agreement obviates any separation of powers concerns in staying the effect of the Secretary's decision. The executive branch has agreed to this outcome, it is not being imposed by the judiciary over the executive's objection, and it will not prevent the Secretary from performing her statutory duties. Thus, there are no "extraordinary circumstances" that justify the application of a "narrow" separation of powers exception.

CONCLUSION

The Superior Court's decision to remand is not a final judgment and there is no compelling reason to depart from the general rule that only final judgments are appealable. To the contrary, judicial economy is best served by allowing the Secretary to reconsider her Ruling in light of the forthcoming U.S. Supreme Court decision in *Anderson*. The Secretary's appeal should be dismissed as interlocutory.

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