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September 13, 2023

David M. Scanlan
Secretary of State
107 North Main Street
Concord, NH 033301

Ballot Law Commission
ATTN: Chairman Bradford E. Cook
Sheehan Phinney
1000 Elm Street, 17th Floor
Manchester, NH 03101

Re: The Applicability of Section Three of the Fourteenth Amendment to the United States Constitution to Presidential Primary Candidates in the State of New Hampshire.

Dear Secretary Scanlan and Chairman Cook:

The purpose of this letter is to provide guidance on my interpretation of the applicability of Section Three of the Fourteenth Amendment to the United States Constitution ("Section Three") to the Secretary of State's obligations and authority upon receipt of presidential primary declarations of candidacy, and to the Ballot Law Commission's authority to hear filing disputes arising over whether a presidential primary candidate is disqualified under Section Three.

I. Statement of Scope:

Your request for guidance arose in the context of substantial public discourse regarding whether Section Three operates to disqualify former President Donald Trump from holding the Office of the President in the future.¹ Therefore, the purpose and scope of this letter is solely to provide guidance on two narrow issues. First, the Secretary of State's responsibilities if and when Mr. Trump files a presidential primary declaration of candidacy with the Secretary of State. Second, the Ballot Law Commission's authority to hear filing disputes regarding the sufficiency of any presidential primary declaration of candidacy that Mr. Trump may file.

¹ For purposes of this letter, I assume that Section Three applies to the Office of the President.

This guidance is based upon the presently known facts and circumstances surrounding the alleged conduct² of Mr. Trump with respect to his anticipated candidacy in the New Hampshire presidential primary election. This letter is not intended to address any other factual circumstance or legal issue. For example, this letter is not intended to address whether, how, or under what circumstances an officer or office of this State could challenge the qualifications of any primary candidate, general election candidate, or elected official. Nor is this letter intended to address situations involving a candidate filing a declaration of candidacy when that candidate has been convicted or otherwise adjudicated guilty of conduct that would constitute committing rebellion, insurrection, or giving aid or comfort to enemies within the meaning of Section Three.

II. Summary:

RSA 655:47, I, requires the Secretary of State to place a presidential primary candidate's name on the ballot if the candidate timely files a declaration of candidacy in the appropriate form and pays a filing fee. RSA 655:47, I, does not afford the Secretary of State discretion to withhold a candidate's name from the ballot on the grounds that the candidate may be disqualified under Section Three when a candidate has not been convicted or otherwise adjudicated guilty of conduct that would disqualify a candidate under Section Three.

RSA 665:7 grants the Ballot Law Commission authority to hear disputes arising over whether "declarations of candidacy" conform with the law. The Commission's authority is limited to reviewing the sufficiency of a declaration of candidacy and does not extend to hearing disputes over whether a candidate is disqualified under Section Three.

III. Declarations of Candidacy-Secretary of State Obligations:

Section Three provides, in relevant part, that: "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Effectively, Section Three bars a person who meets the conditions set forth therein from being a Senator, Congressional Representative, or Presidential elector, and from holding Federal or State offices.

RSA 655:47-48 sets forth how a candidate may file a declaration of candidacy to have their name placed on the presidential primary ballot. Specifically, a candidate must file a declaration of candidacy in an appropriate form with the Secretary of State within the prescribed

² Although Congress passed articles of impeachment on January 13, 2021, which charged Mr. Trump with "incitement of insurrection," the Senate acquitted Mr. Trump on February 13, 2021. Additionally, Mr. Trump has been indicted for various charges, including charges related to the 2020 election, but Mr. Trump has not been convicted of those charges. Nor has Mr. Trump been convicted under federal criminal law for rebellion, insurrection, or giving aid or comfort. See 18 U.S.C. §2383 (providing that a person convicted of this offense "shall be incapable of holding any office under the United States").

filing period and pay a fee. See RSA 655:47, I-II; RSA 655:48. The candidate must sign their declaration of candidacy in the form below and subject to the penalties of perjury:

I, _____, swear under penalties of perjury that I am qualified to be a candidate for president of the United States pursuant to article II, section 1, clause 4 of the United States Constitution, which states, “No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.” I further declare that I am domiciled in _____, in the city (or town or unincorporated place) of _____, county of _____, state of _____, that I am a registered member of the _____ party or that I am a recognized candidate for President in the party in which I desire to file; that I am a candidate for nomination for the office of president to be made at the primary election to be held on the _____ day of _____; and I hereby request that my name be printed on the official primary ballot of said _____ party as a candidate for such nomination.

RSA 655:47, I.

Upon receiving a declaration of candidacy that meets the requirements of RSA 655:47-48, the Secretary of State must print the candidate’s name on the presidential primary ballot. See RSA 655:47, I (providing that the “names of any persons to be voted upon as candidates for president at the presidential primary shall be printed on the ballots upon the filing of declarations of candidacy with the secretary of state in the following form and signed by the candidate”).

The plain language of RSA 655:47-48 indicates that the Secretary of State’s role in receiving declarations of candidacy for presidential primaries is largely ministerial. See also RSA 655:45, III (noting that the Secretary of State is deciding “the regularity of declarations of candidacy” (emphasis added)). Upon receiving a declaration of candidacy, the Secretary of State determines if: (1) the declaration is timely; (2) the declaration includes the required statement of qualifications, signed subject to the penalties of perjury; and (3) the candidate paid the required filing fee. Upon determining that those conditions are met, the Secretary of State must place the candidate’s name on the presidential primary ballot. There is nothing in the relevant statutes that empowers or permits the Secretary of State to engage in independent investigation or to conduct an adjudicative process related to a candidate’s qualifications under Section Three.

Therefore, in circumstances where a presidential primary candidate has not been convicted or otherwise adjudicated guilty of conduct that would disqualify that candidate under Section Three, I conclude that New Hampshire law does not give the Secretary of State discretion to decline to place a presidential primary candidate’s name on the ballot based on an alleged Section Three disqualification. This conclusion is supported by the plain language of the relevant statutes. This conclusion further avoids potentially serious due process concerns that could arise if the Secretary of State were permitted to make unilateral decisions regarding a candidate’s disqualification under Section Three without an adjudicatory process conducted by

the Secretary of State (for which New Hampshire law does not provide) or a conviction or adjudication of disqualifying conduct in another forum.³

IV. Declaration of Candidacy Filing Disputes-Ballot Law Commission Authority:

The Ballot Law Commission is created by statute, and the Commission's duties and authority to hear disputes are therefore limited by its enabling legislation. See RSA chapter 665 (establishing the Ballot Law Commission); RSA 665:6 (setting forth the Ballot Law Commission's general duties).

As relevant here, RSA 665:7 provides that the Ballot Law Commission "shall hear and determine disputes arising over whether nomination papers or declarations of candidacy filed with the secretary of state conform with the law." (Emphasis added.) Notably, RSA 665:7 does not say that the Ballot Law Commission shall hear disputes over whether a candidate is qualified or disqualified under relevant provisions of the United States Constitution, including Section Three. Rather, the Ballot Law Commission's authority is limited to reviewing the sufficiency of "declarations of candidacy" to determine if the declarations "conform with the law."

This interpretation is consistent with prior Ballot Law Commission decisions and with prior guidance that this Office has given the Ballot Law Commission. For example, in Robert Laity v. Ted Cruz & Marco Rubio, Case No. BLC 2015-4, the Ballot Law Commission ruled that it could not adjudicate allegations that Senator Cruz and Senator Rubio were not "natural born citizen[s]," within the meaning of U.S. Const., Art. II, §1. The Commission noted that the meaning of "natural born citizen" was subject to multiple interpretations, and the Commission was not the appropriate forum to determine major constitutional questions. See also Carmen Elliott v. Ted Cruz, Case No. BLC 2015-2 (rejecting a similar challenge to Senator Cruz meeting the definition of "natural born citizen"). Similarly, in Complaint of Dr. Orly Taitz, Esq. Against Barack Obama, Case No. BLC 2011-4, the Ballot Law Commission ruled that its jurisdiction "is limited to a review of the sufficiency of the filing of a candidate" and "does not include investigation of asserted criminal activity, conspiracy or other matters."

This reasoning applies with equal force to a potential Section Three challenge. By statute, the Ballot Law Commission's authority is limited to reviewing the sufficiency of a declaration of candidacy, and the Commission does not have authority to adjudicate factual and legal disputes regarding whether a candidate's conduct is disqualifying under Section Three.

Sincerely,



John M. Formella
Attorney General

³ For purposes of this guidance as applied to Mr. Trump, it is not necessary to determine what, if any, conviction or adjudication might permit the Secretary of State to decline to place a presidential primary candidate's name on the ballot given that Mr. Trump has not been convicted or otherwise adjudicated guilty of any conduct that would arguably implicate Section Three.